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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ÆTNA LIFE INSURANCE COMPANY,
Petitioner,

v.

TEXAS GULF SULPHUR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

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October Term, 1956

Ætna Life Insurance Company,

Petitioner,

v.

Texas Gulf Sulphur Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on August 3, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals in this case (R. 779) is reported in 235 F. (2d) 791 (App. 1), and the opinion of the District Court for the Southern District of Texas is reported in 141 Fed. Supp. 84 (App. 20). The opinion of the Court of Appeals for the Fifth Circuit in a companion case, *Freeport Sulphur Company* v. *Ætna Life Insurance*

Company, decided on July 24, 1953, is reported in 206 F. (2d) 5 (App. 27), and the opinion of the District Court for the Eastern District of Louisiana in that case is reported in 107 Fed. Supp. 508 (App. 34).

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1956 (R. 801). Both parties filed timely petitions for rehearing (R. 822), and these were denied on October 8, 1956 (R. 828). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a Group Annuity contract, under the law of New York where the contract was made, which provides for the purchase at prescribed rates, by an employer of annuities for such of its present and future employees as elect to apply for such annuities and to pay specified contributions toward the cost thereof, but which contract leaves the period within which the privilege will remain open to such future applicants unspecified and unascertainable, may be terminated as to future applicants after the contract has been in force for 16 years, by notice from the insurance company to the employer that no annuities will thereafter be sold except for existing employees and for such new employees as are hired so as to become eligible under that contract within 13 months after receipt of the notice.

2. Whether, in any event, the obligation of the insurance company (a) to take on new employees, or (b) to write additional annuities for existing employees, should not cease, at the latest, upon expiration of the corporate charter of the employer which was in existence and non-renewable at the time the Group Annuity contract was executed.

STATUTES INVOLVED

The statutes involved are:

1. Section 34 of the Federal Judiciary Act of September 24, 1789, Ch. 20, as amended, 28 U.S.C. 1652, which provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

2. New York Insurance Law Section 209, Subsection 1, the material part of which is as follows:

> "1. No life insurance company doing business in this state shall make or permit any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged by it for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof; * * *." See Appendix 43 for full statute.

3. Revised Civil Statutes of Texas, Article 1320, which, insofar as material, provides:

> "Every private corporation as such has power: 1. To have succession by its corporate name for the period limited in its charter, not to exceed fifty years * * *."

4. Revised Civil Statutes of Texas, Article 1315(a) (App. 44).

STATEMENT

This is a declaratory judgment action brought by a Texas corporation against a Connecticut corporation under the

diversity of citizenship clause. The case was heard on motion and cross-motion for Summary Judgment after a motion filed by petitioner for removal to the United States District Court for the Southern District of New York under Section 1404(a) of the Judicial Code had been denied.

In 1934 petitioner executed and delivered to respondent at its principal office in New York City what is known as a Group Annuity Contract (R. 123). The purpose of such a contract is to set forth the terms upon which present and future employees so inclined may have purchased for them annuities or pensions to be paid to them upon retirement. The contract provides that each employee with a full year of service may come under it by making application to and agreeing with the employer, Texas Gulf, that a portion of his wages or salary may be deducted and applied in part payment of the cost. No employee is obligated to come under the contract or to continue under it longer than he desires, and Texas Gulf has the express right to terminate the contract at any time both as to new employees and new annuities for existing employees. In the event of termination of premium payments, whether in whole or in part, suitable provision is made to assure that the items of annuity already purchased will be paid out by the insurance company in exact accordance with the contract but subject to certain options therein given to each employee.

The contract contained a so-called escalator clause to the effect that premiums payable on all employees might not be increased except on every decennial anniversary of the contract and then only to the extent of 5% of the original premium. The only trouble with this contract is that nowhere did it contain any indication as to how long the issuing insurance company, petitioner here, would be obligated to continue admitting new employees into the contract, or how long it would be obligated to continue writing

additional items of annuity for employees for which it had already written some items of annuity.

After the contract had been in force about fifteen years, the parties found themselves at loggerheads on the question of duration, and Ætna finally served notice on Texas Gulf in 1950 that it would not extend the privileges and benefits of the contract to any new employees except such as should become eligible within thirteen months from the date of the notice (R. 98). At the time that notice was served, longevity had increased and interest rates had fallen to such an extent as to require that if a Group Annuity contract had been sold to another employer similarly situated in or about 1951, the prices charged to that employer and his employees would have exceeded the prices payable under the Texas Gulf contract by about 47% (R. 715). This raised the question whether the taking on of new employees at these low premium rates would not violate the New York statute prohibiting unfair discrimination in rates charged for annuity contracts. New York Insurance Law, Section 209(1).

The original object of this suit was to determine the sole question how long petitioner was obligated to hold the Group Annuity contract open to new employees when the contract neither expressed a term of duration nor contained any language from which the intention of the parties as to duration could be inferred. The request for a Declaration of Rights was later enlarged to include a second question: Whether petitioner should not be relieved after December 23, 1959 from continuing to write new items of annuity even for employees who had already purchased some annuities under the contract, because on that date the charter of respondent corporation which was in existence at the inception of the Group Annuity contract in 1934 will expire by its own terms and by operation of law (Rev. Civ. Stats.

Texas Art. 1320), and the only circumstance that enables respondent to continue its existence at all beyond that date is a statute first passed in 1937 — three years after inception of the Group Annuity contract — whose passage the parties could not have been expected to anticipate (Rev. Civ. Stats. Texas Art. 1315(a).

The employees themselves are not parties to this suit and are little concerned with it for the following reason: The Group Annuity contract provides an instrument by which the employer may provide pensions for his employees with the latter paying specified contributions toward the cost, which under this particular Group Annuity contract is much lower than under any other arrangement available to the employer so far as is known. If this present arrangement becomes unavailable, it can be presumed that the employer (as is well nigh universal under modern employee relations practice) will purchase some other Group Annuity contract or make some alternative arrangement to provide the employees with substantially identical amounts of pension at the same contributions from them toward the cost, but at a presumably much higher cost to the employer. The result of the suit will determine merely whether the respondent employer must supplement the employee contributions for years to come by a much greater amount than under this contract, or whether respondent will continue to get annuities until retirement of the last employee fifty or fifty-five years hence (an employee entering the contract in 1964 at eighteen would not reach retirement until the year 2012) at a price for which other employers similarly situated would have to pay about 47% more.

The Court of Appeals held, Chief Judge Hutcheson dissenting, that petitioner could not exclude from the privileges and benefits of the contract any new employees becoming eligible for coverage prior to August 1, 1964, when

the contract will have been in effect for thirty years. Judge Hutcheson, contra, was of the opinion that in order to be consistent with the decision of the same Court in a companion case, *Freeport Sulphur Company* v. *Ætna Life Insurance* (C.A. 5, July 24, 1953) 206 F. (2d) 5, petitioner should be permitted to exclude new employees not becoming eligible by August 1, *1954*, when the contract would have been in force for *twenty years*. The Court was unanimous in holding that the expiration in 1959 of the first 50-year charter of Texas Gulf would not end petitioners' duty either to take on new employees or to write new items of annuity for existing employees in view of the fact that respondent made application in 1951 for the renewal of its charter for another fifty years as authorized by the 1937 statute. The knowledge had by or imputable to the parties in 1934, that respondent corporation would have to dissolve in 1959, there being no opportunity for reprieve afforded by the law then existing, was considered by the Court not to have any bearing or fix any maximum limitation on the presumed intention of the parties as to the time petitioner would be bound to take on new employees or to write new items of annuity for existing employees.

The only material difference between the contract involved in the *Freeport* case and the contract involved in this case is that the Freeport contract permitted petitioner to increase premiums 2½% every 5 years, with an exemption of employees coming into the contract during the first five years, whereas the Texas Gulf contract permitted the premiums to be increased 5% every 10 years with no employees being exempt.

A majority of the Court of Appeals, erroneously we think, treated these escalator clauses as having some bearing on the intent as to duration. They held the difference between the 5-year and 10-year escalations, and the difference in

certain hypothetical and illustrative dates set forth in the respective clauses, to be of such significance as to justify making a 10-year difference between the two contracts in the time when new employees could be excluded.

In both of the cases, it was held that the contract must remain open to new employees "for a reasonable time" to be fixed by the Court — strictly according to its own ideas and without a measuring rod. In the *Freeport* case, under this reasonable time rule, the District Court held that new employees could not be excluded for 25 years from inception (107 Fed. Supp. 508, App. 34), and the Court of Appeals cut it back to 20 years (206 F. (2d) 5, App. 27). In this case, the District Court held that new employees could not be excluded for 40 years from inception (141 Fed. Supp. 84, App. 20), and the Court of Appeals cut it back to 30 years (235 F. (2d) 791, App. 1).

As the matter stands today, the decision is that petitioner must accept under the contract all employee applicants who become eligible for coverage by August 1, 1964, the 30th anniversary of the contract, and it must continue writing new items of annuity until retirement for every employee heretofore or hereafter brought under the contract despite the fact that respondent's first charter will expire on December 23, 1959. An injunction has issued restraining petitioner from refusing to write any future annuities thus adjudicated to be within its obligation.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided important state questions in a way in direct conflict with applicable state law in the following respects: *In refusing to hold* (a) that the contract, lacking any fixed or ascertainable term is terminable at will in its executory features after such time

elapses as to show good faith at inception, and that such time (17 years) had elapsed as a matter of law at maturity of petitioner's first notice of termination dated June 30, 1950 (R. 98); (b) that the contract lacks consideration or mutuality, and has become unfairly discriminatory contrary to the applicable New York statute, and that it is therefore terminable insofar as it remains executory, and was so terminable at the time defendant served its first notice of June 30, 1950 (R. 98); (c) that if the so-called "reasonable time rule" applies in determining when new employees may be excluded, that time had expired long before any notices of termination were served or matured in this case; and (d) that in a complete, fully integrated and unambiguous contract for a succession of acts that could never add up to a completed whole, a court usurps the prerogatives of the parties and exceeds its own if it inserts in the contract a time to which the parties themselves have never agreed nor otherwise become bound.

The contract was delivered to respondent in New York after having been submitted to the Superintendent of Insurance of that State for approval (R. 123). No definite place of performance was fixed or capable of being fixed in the contract, as no one could tell in which direction the operations of respondent would expand; hence, the contract must be interpreted according to New York law. *Freeport Sulphur Company* v. *Ætna Life Insurance Company* (C.A. 5, 1953) 206 F. (2d) 5; Beale, "Conflict of Laws", Vol. 2, page 1155; *Ritterbusch* v. *Sexmith*, 256 Wis. 507; *Smith* v. *Onyx Oil & Chemical Company* (C.A. 3, 1955) 218 F. (2d) 104, and cases cited on page 111.

The contract is terminable at will. The evidence furnished by authoritative New York decisions is overwhelming to show that the highest court of that State would have held the instant contract terminable at will as to future

employees at the time petitioner first sought so to terminate it by the notice dated June 30, 1950 (R. 98). Whenever the question has arisen in New York, it has been held that a contract for the continuous furnishing of any commodity, service or thing is terminable at the will of either party for the future (i.e., insofar as it remains executory) unless a definite term or number is agreed upon or unless there is some other definite measure pointing unerringly to a precise time or quantity. *Sidrane* v. *F. D. R. Realty Corp.*, 296 N.Y. 357; *Cammack* v. *J. B. Slattery*, 241 N.Y. 39, 44; *Jugla* v. *Trouttet*, 120 N.Y. 21; *Bailey* v. *S.S. Stafford, Inc.*, 178 App. Div. 811; *Churchill Evan. Assn. Inc.* v. *Columbia Broadcasting System*, 236 App. Div. 624; *Chatham Plan, Inc.* v. *Clinton Trust Co.*, 246 App. Div. 498; *Comora* v. *Mariano*, 24 Misc. 755; *Biber Bros. News Co.* v. *N. Y. Evening Post*, 144 Misc. 405; *Capital City Surety Co.* v. *Lazarus*, 221 App. Div. 740; *Baylies* v. *Automatic Fire Alarm Co.*, 70 App. Div. 557; *United Chem. & Exterm. Co.* v. *Security Exterm. Corp.*, 246 App. Div. 258; *Conrad* v. *Golden*, 89 N.Y.S. (2d) 689; *Cronk* v. *Vogt's Ice Cream*, 15 N.Y.S. (2d) 649.

In speaking of such contracts of indefinite duration, the courts have referred to the sanctity of "the unconditional right reserved by law to each (party) to terminate at will", as in the *Chatham Plan* case, *supra*, and in denying recovery for an alleged wrongful termination have said, as in *Cronk* v. *Vogt*, *supra*,

> "The fatal obstacle to recovery is rather that the parties did not agree as to how long the contract was to run. * * *
>
> "The general rule is well known. A contract, calling for continuing performance and containing no provision

for its duration, is ordinarily terminable at will (***)." (Cases cited.)

A typical case is *Bailey* v. *Stafford*, 178 App. Div. 811. There, the plaintiff agreed to manufacture an ink eradicator and the defendant agreed to buy it, but the agreement was for an unstated period and quantity. The defendant later gave notice of termination, and in sustaining his right so to do, the Appellate Division said (p. 815):

> "The learned justice below has held that inasmuch as there was no provision for terminating the contract of March 28, 1904, it is still a subsisting binding agreement, notwithstanding the six months' notice of its termination given by the defendant to the plaintiff on January 16, 1915. In this he is clearly in error. When a contract is not limited as to the time of its duration, it is terminable at the will of either party, upon giving a reasonable notice to the other. (Outerbridge v. Campbell, 87 App. Div. 597, 599, and cases cited; Kenderdine Hydro Carbon Fuel Co. v. Plumb, 182 Penn. St. 463, 469.)"

The only reference to these New York decisions made by any of the judges below in either the *Freeport* case or this case was the following short comment made by Judge Wright of the District Court in his opinion in the *Freeport* case (107 Fed. Supp. 512):

> "Ætna then suggests that since the contract cannot be construed to be perpetual and since it has no definite term, it is cancellable at will by either party. Ætna cites many cases from New York and elsewhere to support its position. (Cases cited.) All of these cases, however, are clearly distinguishable from the case at bar. These cases involve employment contracts, agency contracts, commodity and service contracts. None of them involves an employees' group annuity contract nor any contract similar thereto."

The distinction thus made between a Group Annuity contract and the contracts involved in the New York cases above cited is not further explained and is not readily grasped. Reference is made in some of the opinions below to "the distinctive characteristics which inhere in insurance contracts" (206 F. (2d) 7, App. 30). *But the court has no more power to make an insurance contract for the parties than any other type of contract,* and if the so-called insurance contract, as in this case, is of the kind that lays down rules for the optional purchase of new items of the thing with which it deals for an unnamed period *in futuro,* the principles that govern it are exactly the same as those that govern contracts of the same purport in every other field. It is not readily perceived how there should be a difference in the principle that should govern a contract for the future purchase and sale of tons of sulphur, bales of hay, quarts of ice cream, or ink eradicator, over an indefinite period, and a contract for the future purchase and sale of annuities, insurance policies, surety bonds, or corporate stocks, over an equally indefinite period.

The New York cases holding contracts of the kind involved here terminable at will by either party are in conformity with the rule which is apparently universally applied. The general authorities holding such contracts terminable at will are set forth in the report of the *Freeport* case in 41 A.L.R. 2d 762, 767, to which reference is made. More recent cases on the same point are: *Meadows* v. *Radio Industries* (C.A. 7, May, 1955) 222 F. (2d) 347; *Town of Vinton* v. *City of Roanoke,* 195 Va. 881; *J. C. Millett Co.* v. *Park & Tilford Distillers Corp.* (D.C. Cal., 1954), 123 Fed. Supp. 484; and *Superior Concrete Accessories* v. *Kemper* (S. Ct., Mo., Nov. 14, 1955), 284 S.W. (2d) 482.

If the New York cases left any doubt that, there, this contract would be held terminable at will by petitioner as to new employees, strong makeweights in favor of the termination privilege lie in the fact that no mutuality of obligation exists (respondent not being bound to offer the coverage to any new employees nor they bound to accept it), and no actual or intended consideration was paid for an option privilege to stretch into the future; and in the further fact that, by a change of circumstances and without the fault of either party, the contract has in fact become discriminatory in favor of respondent to such an extent as to be unfair to other employers similarly situated — and particularly to respondent's competitors. Indeed, either one of these points might be legally sufficient in itself to sustain the termination privilege if it were not otherwise sustainable.

All that was ever said in any of the opinions below about the obvious necessity for the contract to be supported either by consideration or mutuality was in Judge Wright's opinion in the *Freeport* case (107 Fed. Supp. 513) in which he said:

> "The consideration supporting the contract also supports the option (to include new employees) which is one of the terms of the contract."

It seems evident that in reaching this conclusion the courts below overlooked the significant fact that, in these cases, the employer does not pay one annual or monthly premium but the sum total of many premiums. Every dollar of the total premium is allocated to and identified with a particular individual, and it is thus made impossible to say that such earmarked consideration was in part intended to pay for the purchase of an option for some *other* individual who might at some future time become a member

of the class eligible for coverage. It might conceivably be said that a premium paid for A purchased an option for A to continue buying further annuities until retirement. It would be quite another and different thing to say that this premium which was paid for A, and of which he himself paid a substantial portion, is to be construed as payment for an option to include B, X, Y and Z, persons unknown to A and perhaps not even born at the time A joins in making the payment. Nothing short of an express declaration should lead to the conclusion that each individual premium paid not only purchased an annuity for that individual, but also purchased a right in the employer to bring within the contract an indefinite number of other individuals, who in their turn would pay a like premium for themselves and for a future right to bring in yet other individuals.

In order to show conclusively that payment made for and allocated to the individual annuities purchased before notice of termination is not consideration for the right to purchase more for different individuals, so as to dispense with the necessity of mutuality, it should be only necessary, out of hundreds of cases on the subject, to refer to *Oscar Schlegel Mfg. Co.* v. *Peter Cooper's Glue Factory*, 231 N.Y. 459; *Howard* v. *Mercury Record Corp.* (CCA 5, 1943) 178 F. (2d) 449; and *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489. In all three of those cases, orders had been placed and paid for pursuant to the purchase and sale contract, but this was held not sufficient to establish an option for further purchases or sales. In the controlling *Schlegel* case, the fact that large orders had been filled and paid for is shown in the Appellate Division opinion, 189 App. Div. 843, but in spite of this, the Court of Appeals held that the contract was void for lack of consideration or mutuality. That case still represents the law of New

York and hence the law to be applied here. In it the Court said:

> "The plaintiff, it will be observed, did not agree to do or refrain from doing anything. * * * The only obligation assumed by it was to pay nine cents a pound for such glue as it might order. * * * Unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound."

This question of the necessity for mutuality or consideration is thoroughly discussed in a recent compendious annotation in 26 A.L.R. (2) 1139.

On the question of discrimination the record shows that any other employer wishing to purchase from petitioner a new Group Annuity contract in 1950 with similar employee benefits and contributions to the Texas Gulf Sulphur contract issued in 1934 would have had to pay in that year approximately 47% more in premiums than the Texas Gulf Sulphur Company paid in that year (R. 715).

The divergence between what respondent paid in 1950 for its new eligible employees and what another employer buying a master contract from petitioner in that year would have had to pay for the same benefits for its employees is so great as to be unfair on its face, and hence illegal under the New York statute (Ins. Law Sec. 209.1), unless immunized by the doctrine of relation back. The question then is this: Does the fact that a nondiscriminatory master contract was executed in 1934 entitle the parties by agreement, or compel an insurer balking an agreement, to extend the benefits to new persons at these bargain basement prices after it has become obvious that these 1934 rates, with all permissible increases, when compared with modern rates, have become unfairly discriminatory beyond any foreseeable hope of improvement?

This question should be answered in the negative under the doctrine set forth in *Stephen Peabody, Jr.* v. *Travellers*

Insurance Co., 240 N.Y. 511 148 N.E. 661. See also *Daniel* v. *Tyrrell & Garth Investment Company,* 127 Tex. 213; *Town of Vinton* v. *City of Roanoke,* 195 Va. 881. The rule is as set forth by Judge (later Justice) Van Devanter in *United States* v. *Dietrich,* 126 F. 671, 674, as follows:

> "It is well established by the English courts and by the courts of this Country, federal and state, that where performance of a contract or agreement, lawful in its inception, becomes unlawful by reason of any subsequent event, the contract or agreement is thereby dissolved or terminated, insofar as it remains executory, and both parties are excused from its further performance." (Citing cases from New York and elsewhere.)

Leaving the discrimination question, we now point out that if it could properly be held that the reasonable time rule applies in New York to a case of this character, the cases there at the least furnish a measure of what it is. In the case of *Feuerstein* v. *Zukor* from the Second Circuit, 174 F. (2d) 371, which case dealt with New York law, the time which elapsed was three and one-half months between execution and termination. In *Cronk* v. *Vogt's Ice Cream, supra,* the period was nineteen months. In *Jugla* v. *Trouttet, supra,* it was thirteen months. The relatively short periods involved in these cases respectively were obviously deemed sufficient to meet whatever test the courts thought was appropriate, and when those periods are compared with seventeen years, the time which elapsed in this case between execution of this contract and maturity of the first notice of termination, there can be no doubt at all of what New York would say about the present case. It would say that the contract had been open to new entrants a reasonable time, *as a matter of law,* when Ætna served its first termination notice to take effect seventeen years after the

contract was made. See also the following leading cases: *Texas & Pacific Ry. Co.* v. *City of Marshall,* 136 U.S. 393; *Jones* v. *Newport News Co.,* 65 F. 736; and *Barney* v. *Indiana Railroad Co.,* 157 Ind. 228.

It seems clear, however, that the reasonable time rule was not the proper rule to apply to this case under the decisions of New York or of any other state, and that the cases the lower courts cited in support of the application of that rule to this case (see 107 Fed. Supp. 513, App. 34) are not in point. The reasonable time rule applies only in these three situations: (a) where there is a fixed, definite and measurable thing to be done under the contract, such as building a house or delivering goods to a particular place. This is the usual sort of contract calling for resort to that rule. A typical case is *Pope* v. *Terre Haute Car & Mfg. Co.,* 107 N.Y. 61; (b) where the contract shows necessity for such large initial efforts and expenditures to be made in contemplation of performance as to preclude the possibility that the parties could have intended to leave it in the power of one of them to make these investments or arrangements fruitless to the other. A fair example of this type of case is *McKell* v. *Chesapeake & Ohio Ry. Co.* (CCA 6) 175 F. 321, 186 F. 39; (c) cases where one of the parties has been given an option to buy for an unnamed and unascertainable period and has paid valuable consideration for the option privilege *over and above the purchase price of the things he elects to buy. Bach* v. *Friden Calculating Mach. Co.* (CCA 6, 1946) 155 F. (2d) 361.

Never in any adjudicated case in New York or anywhere else, as far as we are able to find out, has a court claimed and been sustained in the power to fix a time in which a purchaser shall have a continuing right at his election to buy more of the thing bargained for, when the contract is silent on the subject, when the purchaser does not have to

buy unless he wants to, and when the only money or other consideration that ever moved from the purchaser to the seller was the purchase price of the things already bought and delivered before the other party by notice attempted to relieve himself from the duty of filling further orders. In short, the reasonable time rule does not and cannot apply to a contract for a succession of acts that could never add up to a completed whole. A case from the Second Circuit dealing with New York law pinpoints the difference between a contract for a completeable act or a completeable series of acts and the sort of contract we have here. See *Feuerstein* v. *Zukor, supra,* 174 F. (2d) 371.

The Group Annuity contract in this case contains a specific provision to the effect (R. 33) that "this contract constitutes the entire contract between the parties", and it was testified by the officer of respondent who made the contract in its behalf that there were no agreements of any kind, express or implied, except as shown in the contract (R. 648-9). The contract merely omits all reference to duration, and it is well settled that an omission is not an ambiguity. In *Re Rivas' Trust,* 100 N.Y.S. (2d) 357; *Marcelle* v. *Sol & S. S. Marcus Co.,* 274 Mass. 469; *Michigan Chandelier Co.* v. *Morse,* 297 Mich. 41. The following correct statement of Judge Wright of the District Court, in the *Freeport* case (107 Fed. Supp. 508, 512, App. 39) is equally applicable to the contract here:

> "There is nothing ambiguous about the contract. It just does not have an express term and nothing can be gleaned from the contract itself or from the intention of the parties which supplies this deficiency."

Hence, it is improper to read anything into the contract or to receive evidence *aliunde* as to the intention of the parties. The highest court of New York in many cases has

warned against the temptation to "make a new contract for the parties under the guise of interpreting the writing" (*Friedman* v. *Handelman*, 300 N.Y. 188), and has said that "in construing a contract, courts concern themselves with what the parties intended, but only to the extent that they evidence what they intended by what they wrote." (*Wilson Sullivan Co.* v. *International Paper Corp.*, 307 N.Y. 20). As late as 1954, in *Nichols* v. *Nichols*, 306 N.Y. 490, it was said:

> "The first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein. Hartigan v. Casualty Co. of America, 227 N.Y. 175, 179, 124 N.E. 789, 790; Brainard v. New York Cent. R. Co., 242 N.Y. 125, 133, 151 N.E. 152, 154, 45 A.L.R. 751."

In New York, the parol evidence rule is a rule of substantive law rather than a rule of procedural law and is the rule to be applied by the Federal Courts in diversity cases. *Zell* v. *American Seating Co.*, (CCA 2, 1943), 138 F. (2d) 641 (reversed on other grounds, 322 U.S. 709); Annotation: 21 A.L.R. (2d) 247. The New York rule of evidence applicable to this case is clearly set forth in *Gearns* v. *Commercial Cable Co.*, 293 N.Y. 105, where the court quotes from an earlier case, as follows:

> "The construction of a plain contract is for the court. The intention of the parties is found in the language used to express such intention. Hartigan v. Casualty Co. of America, 227 N.Y. 175, 124 N.E. 789. If the court finds as matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision of the case. Plain and unambiguous words, undisputed facts, leave no question of construction except for the court. The conduct

of the parties may fix a meaning to words of doubtful import. It may not change the terms of the contract."

The best statement explaining the reason why courts have heretofore refused to insert a provision as to time in a contract of the nature of the one involved here, where the parties have left it out, is given in the English case of *Aspdin* v. *Austin*, 5 Q.B. 671, 114 Reprint 1402, as follows:

> "It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued * * * and yet neither party might have been willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instruments all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they either purposely or unintentionally have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is of course quite unauthorized as well as liable to great practical injustice in the application."

See also *Stockton Dry Goods Co.* v. *Girsh*, 36 Cal. 2d 677, 227 Pac. (2d); and *Williamson* v. *Miller*, 231 N.C. 722.

The instant case and the *Freeport* case are of themselves sufficient to show that the reasonable time rule is no rule at all as applied to cases of this character. The four judges that have participated in the decision of this case in the District Court and the Court of Appeals have, on one theory or another, come up with three different and rather widely separated dates as the beginning of the time when new

employees may be unilaterally excluded from coverage by petitioner: Judge Kennerly, 40 years from inception, Judges Brown and Cameron, 30 years from inception, and Chief Judge Hutcheson, 20 years from inception. And the seven judges who have participated in this case and the *Freeport* case (206 F. (2d) 5) in the District Court and the Court of Appeals have come up with four different and rather widely seperated dates as the beginning of the time when new employees may be unilaterally excluded from coverage by petitioner: Judges Russell and Wright, 25 years from inception, Judges Hutcheson and Strum, 20 years from inception, Judges Brown and Cameron, 30 years from inception, Judge Kennerly, 40 years from inception. Every one of these periods of time is picked out of the air and has no more support than any of the others of them or than any different date that might have been selected. A rule which can give rise to such a divergence of opinion within the narrow compass of these two cases is patently of such doubtful validity, as applied to this sort of contract and situation, as to be no better than measuring the duration of the contract by the length of the Chancellor's foot. If contracts can ever properly be made by the courts for the parties, surely it is not proper for the courts to make them on such a hit-or-miss system as could cause the duration of the same or two practically identical contracts to vary by several decades.

The judgment and opinions in the courts below cannot stand consistently with the New York cases above cited on the various points involved, and the irreconcilability is so clear as to make it evident that no fair attempt has been made to follow the rule as laid down by this Court in *Erie Railway Company* v. *Tompkins*, 304 U.S. 64.

2. Insofar as the decision below is based on a presumption that the parties intended at inception to bind petitioner to write annuities for new employees and new items of annuity for existing employees after the time the law said *there could be no employees* as the corporation must dissolve, the decision is so unreasonable and extraordinary on its face as to call for correction in the exercise of this Court's power of supervision over the administration of justice in the Federal Courts.

There is no conceivable basis for a presumption that the parties intended to bind petitioner to begin writing annuities for new employees, or to continue writing new items of annuity for existing employees, after December 23, 1959, when respondent's first charter will expire. In 1934, when the Group Annuity contract was made, there was no provision permitting renewal of respondent's charter, *Flowers* v. *Pecos River R. Co.* 138 Tex. 18, and the law was then established in Texas that a corporation of that State, after the expiration of its charter pursuant to the mandate of statute, could do no act based on a motive to continue rather than to wind up the business. *Giles, Receiver* v. *Stanton,* 86 Tex. 620; *Orange Lumber Co.* v. *Toole,* 181 S.W. 823; *Lyon-Gray Lumber Co.* v. *Gibraltar Life Ins Co.*, 269 S.W. 80.

Therefore, it could not have been anticipated by the parties that there would be any new employees or even any continuation of the employment of existing employees after dissolution.

The question is, stated succinctly, whether, when dealing in presumptions of intention, there is not a presumption more compelling than all others put together, and that is, that the parties did not intend to contract or pay consideration for obligatory performance beyond life. *Holt* v. *St. Louis Union Trust Co.*, 52 F. (2d) 1068; *Pullman Palace*

Car Co. v. *Central Transportation,* 171 U.S. 138. A conclusion that the parties did mean to bind Ætna to write new items of annuity beyond Texas Gulf's first 50-year life would require the court to presume (a) that the parties anticipated and contracted with a view to the 1937 amendment to the statute which for the first time authorized Texas Gulf to prolong its life; and (b) that Texas Gulf in 1934 and through the succeeding years paid and intended to pay consideration for a promise on Ætna's part to write new items of annuity if Texas Gulf should decide to take advantage of this anticipated new statute, and if such new items of annuity should be thereafter applied for. Such violent presumptions would not even be based on what could fairly be called a "reasoned guess" and would amount to a judicial fiat.

The Group Annuity contract does not run to respondent, *its successors and assigns,* but only to the company itself, in the span of its life as defined by the charter of its existence as of August 1, 1934, when the Group Annuity contract was made. This Court attached much significance to the particular language of the contract as showing whether or not there was an intention for a contract to outlast a charter and cover a successor, in *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 163 U.S. 564. It was there held that since the contract was expressly binding on the successors and assigns of the parties, it was not invalid merely because the charter would expire before the expiration of the contract. But in the instant case, there is no indication in the contract itself or in any evidence that has been presented which tends to raise any presumption that the parties intended executory performance under the contract to outlast the charter, or that both or either of the parties would have so bound themselves if the question had ever been raised or discussed. True, hypothetical dates are set

forth in the escalator clause which go up to 1974, 15 years beyond the time set for termination of the charter, but the Group Annuity contract was designed to take care of either a long or a short duration, and regardless of the most unlimited legal right either or both parties might have had to terminate in 1959, no one could predict whether either would desire to take advantage of such right at that time or, on the other hand, whether they might not prefer and agree to keep the contract in force in favor of a new or successor corporation which might be organized to take over respondent's business. In short, the last date set forth in the contract is not an admission that no right of termination exists until that date is reached but is merely a recognition of the fact that there might be no occasion calling for exercise of the right. If conditions in 1959 should be favorable to petitioner, it might be perfectly willing, not under compulsion of the contract but voluntarily, to execute a rider continuing the contract in favor of "X corporation, successor to the Texas Gulf Sulphur Company." This would certainly be much better than having to start over and write a whole new contract.

The question is *not*, as the court below seemed to think, whether a contract *made* to last beyond the duration of a Texas corporation charter is on that account rendered invalid on its face from the beginning. The question is whether a contract which is not made to last any specific or ascertainable time should be, by court decision, *decreed* to last, against the consent of one of the parties, beyond the particular life of the corporation which was the only life anyone could have known it would have when the contract of indefinite duration was entered into. This Court answered that question, *a fortiori*, in *Pullman Palace Car Co.* v. *Central Transportation*, 171 U.S. 138. It was there specifically held that:

"A contract made to run during the corporate life of one of the contracting parties is not extended by the extension of the charter of that party *in the absence of a provision to that effect in the contract.*"

The Court further says:

"We think the contracts were not extended by the legislative extension of the charter of the Central Company by the act of 1870. Some of these contracts were to last during the corporate life of the Central Company. At the time they were made, the charter of the company would expire in 20 years from December 30, 1862, or on December 30, 1882. We do not think the contracts meant that they were to cover any further time to which the Legislature might thereafter extend the charter of the company. Some language to that effect would have been contained in the contracts if such had been the meaning of the parties. All the contracts had therefore expired by the end of 1882."

CONCLUSION

For the foregoing reasons, this petion for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ÆTNA LIFE INSURANCE COMPANY,

Appellant,

v.

TEXAS GULF SULPHUR COMPANY,

Appellee.

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(August 3, 1956.)

(235 F. (2D) 791)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: As the opinion of Chief Judge Hutcheson so colorfully portrays the case, accurately delineates the issues, expounds the competing contentions and, by contrasting the large area of our mutual agreement with the limited scope of our differences, effectively emphasizes the point of departure, we think it best to indicate briefly our disagreement in result and reasoning and thus preserve the continuity of that opinion.

We are all in agreement that the *Freeport* decision was correct. With unhesitating fidelity to that result and *Freeport's* reasoning, we each seek diligently to discover and apply its teachings. We are also all in agreement that in its interpretation, the nature of the judicial system based on written opinions as the means of giving life to law and

guidance to its craftsmen, requires that we, as would any other Judges, read it for what it says and then *say* what it says, Mississippi Valley Barge Line Co. v. Indian Towing Co., Inc., 5 Cir., 232 F. 2d 750, 1956 AMC 757, with none having, with none claiming, in that process, advantage or disadvantage from participation in that former appeal or the opinion.

We are likewise in agreement that, though responsibility must be laid at our feet for having led him into it, the District Judge gave too much, indeed almost conclusive, weight to the much discussed words[1] of the opinion. We are, finally, in agreement that, reiterating here *Freeport's* determination that the parties contemplated a *long-time* contract of extended duration — a holding which completely undercuts Ætna's main prop, the argument of non-mutuality and the incongruity of giving Texas Gulf but not it, an unlimited escape — what we attempted to do, what we intended to do, there was to declare in terms of law, the time *beyond* which the parties could not reasonably have meant to go — a time we fixed there at March 31, 1954, for a total term of 20 years.

It is here that our paths diverge. For agreeing once more that a 20-year term has no magic legal significance and that this conclusion of law must find its source in the setting of the *Freeport* contract, Judge Hutcheson concludes, as we cannot, that the contracts are identical and hence, results must be identical. In that process he also disregards altogether the much mooted sentence and actually abandons the stated rationale of *Freeport* — reasonable time — for an entirely new concept advanced to this day nowhere in prior opinions or briefs, that the continuing option was binding only for the "—year period *entered* upon thereafter."

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[1] Judge Strum wrote:

> "In reserving the right to modify the premium rates on this policy, however, Ætna specifically provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date."

But the contracts are different — significantly different in the very area of specified contract periods, and admittedly because of the difference in the underlying bargains. In *Freeport* rates as to annuities, original and increased, could *never* be raised as to employees coming under the plan in the first five years (1934 to 1939). Recognized soon as an onerous agreement, Ætna a few months later was unwilling to extend that vital privilege to Texas Gulf and sought[2] (in the intense sales campaign it waged to *persuade* Texas Gulf to give it this business) by extending the periods from five to ten years, to make up for it. It is, we believe, unreasonable for us, as Judges, to think that when two huge business concerns negotiate on high levels between articulate, skilled executives over a contract of immense importance to both, that this difference was either trivial or, as Ætna puts it, "adventitious." And, accepted Judge Hutcheson's rationale of an option limited to the contract period then "entered upon", the contract, expressly making Texas Gulf's for ten, rather than *Freeport's* five-year period, subjected Ætna to *double* that obligation.

So, while we do not think, on the one hand, that the words (note 1, *supra*) are conclusive, we are, on the other hand, equally unwilling either to disrate them in Ætna's words, brief page 25 as "* * * evidently thrown in for good measure and without much thought * * * demonstrably conceived in

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[2] Ætna's brief [page 22], after pointing out the difference between *Freeport* and Texas Gulf contract, states: "By August 1, 1934, when the Texas Gulf contract became effective, Ætna was no longer willing to exempt the employees entering the plan during the first 5 years from increases. But perhaps with a will to make up to Texas Gulf in a measure for the denial of this valuable exemption no longer available to anyone, Ætna agreed not to increase premiums on any employees for 10 years from inception (instead of 5 as in Freeport) and not to make subsequent increases except to the extent of 5% of the original premiums every 10 years (instead of 2½% every 5 years as in Freeport). * * *"

error * * * included through inadvertence * * * [and thus] * * * entitled to little weight * * *", or effectually disregard them altogether because, in Judge Hutcheson's language, these "* * * specific dates are of no more significance in the determination of the overall reasonable time for its ending than those periods introduced by 'et cetera'." We think here, as in *Freeport*, they were of significance and so intended by the Court. The very spirited attack (see note 8 Judge Hutcheson's opinion) so soon made on them by *Freeport's* Petition for Rehearing brought these very arguments to the Court's attention while it was still fresh and new. Of course, it would be unrealistic to say that opinions must be amended or modified to meet every supposed deficiency pointed out in Petitions for Rehearing, but we who now follow can hardly assume, in this posture, that this was mere makeweight.

As we have pointed out, there is a critical difference both in date and reasons as between the *Freeport* and Texas Gulf contracts. It, we think, both highlights the difference in specified times and, correlatively, the similarity of purpose. So that, once again, we are all in agreement that the "key" is largely to be found in this contractual provision. In *Freeport* those coming under the plan during the first period (1934 to 1939) could not be affected by subsequent increases and their rights were beyond alteration of any kind. Obviously then, the escalation could apply only to those coming in during the three subsequent periods (1) 1939 to 1944, (2) 1944 to 1949, (3) 1949 to 1954. It was this time that the Court in *Freeport* considered, as a matter of law, to be within the range of reasonableness. Applying the same formula of three comparable periods subject to escalation in the Texas Gulf contract, the periods will be (1) 1934 to 1944, (2) 1944 to 1954, (3) 1954 to 1964, with the terminal date then fixed at August 1, 1964. Since there is no "exempt" period and, unlike the *Freeport* contract, Texas Gulf annuitants coming under the plan during the "first" period

(1934 to 1944) are subject to the subsequent escalation increases, we thus adhere uniformly to the principles established in *Freeport* and yet take adequate account of the differences.

The decree of the District Court appealed from in this cause will therefore be modified so as to designate August 1, 1964, as the date upon which Ætna has the right to discontinue the contract as to new coverages, and, as so modified, said decree will be affirmed.

MODIFIED AND AFFIRMED.

HUTCHESON, Chief Judge, Concurring in part and dissenting in part:

This appeal from a summary judgment presents for review what, with minor and unimportant variations, is a twice told tale of two group annuity contracts entered into on April 1, 1934, and August 1, 1934, between Ætna Life Insurance Company, as insurer, and Freeport Sulphur Company, on the one hand, and Texas Gulf Sulphur Company, on the other, as employer. It is concerned with the contentions, counter-contentions, and litigations arising out of the fact that in neither of the contracts was a time of termination stated, and thereby hangs the tale.

The first contract gave rise to the litigation in the District Court of the United States for the Eastern District of Louisiana, which was dealt with and disposed of, in the District Court, in *Freeport Sulphur Co.* v. *Ætna,* 107 F. Supp. 510, and, in this court on appeal, in *Freeport Sulphur Co.* v. *Ætna,* and reverse title, 206 F. (2) 5.

As the tale unfolded in the first suit, with Freeport in its self-assigned role of Little Red Riding Hood, and Ætna in that assigned to it by Freeport of the wicked wolf, Freeport's claim was that the contract was in perpetuity and was without termination, while that of Ætna was that the contract neither states nor implies any term for the

duration and is subject to a good faith termination by Ætna at any time.

The district judge, to whom the controversy was submitted on motion for summary judgment filed by Ætna and Freeport, rejecting both of these views as extreme and unwarranted, held that the contract was one for a reasonable time, and that the evidence fixed this at twenty-five years, and April 1, 1959 as the day upon which Ætna might discontinue writing new coverages at the rates provided in the several steps. Dissatisfied with the judgment, both Freeport and Ætna appealed, and this court, agreeing with the district judge throughout except as to what was a reasonable time for termination of the contract, held, one judge dissenting, that the evidence fixed this not at twenty-five but at twenty years. The decree was accordingly modified so as to designate April 1, 1954, as the day upon which Ætna might discontinue the writing of new coverages, and, as modified, the decree was affirmed.

It is the second of these contracts, with respect to which contentions and controversies had arisen before and had been going on during the pendency of the Freeport suit, which has given this litigation rise. Filed by plaintiff, Texas Gulf Sulphur Company, in the Southern District of Texas, on January 20, 1953, when the Freeport suit had finally come to an end, the complaint alleged: that an actual controversy had arisen between plaintiff and defendant as a result of a notice given by Ætna, that it had the right to refuse coverage to persons becoming employees after July 31, 1950, and that it was entitled to charge rates for the coverage of such employees in excess of the rates set forth in the schedule of guarantees in said group annuity contract. Alleging that, as to such persons, defendant can make no increase in its rates other or greater than as set forth in said schedule, plaintiff sought a declaratory judgment, that Ætna continued to be obligated at the rates provided in the contract to insure all such persons employed after July 31, 1950, and an injunction.

By amended complaint, plaintiff alleged that, after the filing of the suit, plaintiff had received from defendant a supplemental notice,[1] dated January 26, 1954, fixing August 1, 1954, when the contract will have been in force twenty years, as the cut-off date, and further stating in effect that after December 23, 1959, it would not be bound under the group annuity contract to sell any further annuities.

Ætna first moved under Sec. 1404(a) to transfer the cause to the Southern District of New York for the convenience of the parties and in the interest of justice. This motion denied, Ætna answered defending its right to issue the notices complained of and to take action in accordance therewith.

Thereafter, alleging that the contract on its face evidenced an intention by defendant that it was to continue at least to the year 1984, and attaching documents, affidavits, depositions, and letters, plaintiff filed a motion for summary judgment, declaring invalid the notices issued by Ætna, purporting to terminate the contract, and ordering specific performance of it until the year 1984.

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[1] "(1) We hereby respectfully notify you that we stand in all respects on the notice directed to you on or about June 30, 1950, Exhibit 2, to your complaint in Texas Gulf Sulphur Co. v. Ætna Life Ins. Co., now pending in the United States District Court at Houston. However, we hereby further notify you that if said former notice should for any reason be held premature or otherwise defective, the privileges and benefits of your Group Annuity Contract No. GA-114 will in no event be extended to any employees not becoming eligible for coverage, under the terms of the said contract, prior to August 1, 1954, when the contract will have been in force twenty years.
"(2) We notify you further, as a new and independent proposition, that after Dec. 23, 1959, when your initial charter expires, no further annuities or items of annuity will be sold or issued under the said Group Annuity Contract No. GA-114 to, for, or on behalf of any person whomsoever, whenever employed, and whether or not now purchasing annuities or items of annunity under the contract.
"(3) We are giving you this supplemental and additional notice in order that its validity may be determined in the suit now pending if either party so desires."

Defendant Ætna, on its part, basing its motion upon the pleadings, affidavits, and exhibits in the case, moved for a summary judgment, declaring: the notice of June 30, 1950, issued by it, valid; that the contract was as matter of law terminable as of August 1, 1951, the date named in the first notice; and that, in the alternative, the first paragraph of the notice of January 26, 1954, note 1, *supra*, was valid and effective, and the contract was terminable as of August 1, 1954, and judgment should so declare.

Finally, and as an additional, separate, and independent ground, defendant alleged that the second paragraph of the notice of January 26, 1954, note 1 *supra*, is valid and effective and entitles defendant to refuse after December 23, 1959, when the present existing charter of plaintiff expires, to write any further annuity or items of annuities.

On these motions, supported by a voluminous record made up of documents, affidavits, and depositions, there was a full hearing and argument, and the district judge, holding that the case was ruled by our opinion in the similar case of *Ætna* v. *Freeport Sulphur*, decided by this court, 206 F. (2) 5, determined that a reasonable time under the contract in suit was forty years. He entered his decree accordingly. Ætna has appealed.

In the course of his carefully prepared opinion in the cause,[2] referring to the Freeport litigation and correctly declaring, "The contract here is substantially the same as the Freeport contract, the facts in this case and in that case are quite similar, and most of the questions raised here were settled by the opinion in that case", he held, as the *Freeport* case had held, that the contract, though not a perpetual, was a continuing, one, not terminable by Ætna at its will or void for want of mutuality, and that, "since no term for the option is provided in the contract, it is terminable after a reasonable time."

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[2] 141 F. Supp. 84.

Declaring: "This court is, therefore, called upon, as the courts were called upon in the *Freeport* case, to determine what is a reasonable time", and noting that the district judge in the *Freeport* case had held twenty-five years a reasonable time, while this court holding this to be excessive had declared twenty years reasonable, the district judge thus carefully set out the dominant clauses.[3] These, placed in each contract in accordance with "the guarantees to the

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[3] Saying: "That modifying clause in the Freeport contract referred to by both courts is as follows:

'* * * provided that at no time between April 1, 1939, and Mar. 31, 1944, shall premium rates be established which are more than 7½% greater than the original rates, at no time between April 1, 1944, and Mar. 31, 1949, shall premium rates be established which are more than 10% greater than the original rates, at no time between April 1, 1949, and Mar. 31, 1954, shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates *increasing by 2½% of the original rates for each five year period entered upon thereafter.*' (emphasis supplied)

"A similar clause in the contract here is as follows:

'The company reserves the right, upon three months' written notice to the employer, to modify any one or more of the following at any time after this contract has been in force ten years:

* * *

'(c) **The premium rates in Tables A, B, and/or C provided, however, that at no time between Aug. 1, 1944 and Aug. 1, 1954, shall premium rates be established which are more than 5% greater than the original rates, at no time between Aug. 1, 1954 and Aug. 1, 1964, shall premium rates be established which are more than 10% greater than the original rates, at no time between Aug. 1, 1964, and Aug. 1, 1974, shall premium rates be established which are more than 15% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates *increasing by 5% for each ten year period entered upon thereafter.*' (emphasis supplied)

the court concluded: "Using the same process of reasoning here as there, it seems clear that Ætna itself contemplated that the contract here would remain in effect at least until Aug. 1, 1974, or a period of forty years from its date."

employer of premium rates", while guaranteeing the continuance, during each successive period "entered upon", of the rate fixed for that period, reserved to Ætna the right to determine as to each new period whether it would be entered upon.

Rejecting plaintiff's contention that the parties contemplated that the contract should remain in force until 1984, or for fifty years, the district judge also rejected defendant's contention that, if the *Freeport* decision was adhered to, a reasonable time would be twenty years, and its independent contention that after 1959, the date when the original charter of Gulf would have expired, defendant could cease altogether writing new contracts.

Reasoning by analogy from the statement in our opinion in the *Freeport* case in effect that the mention of the year 1954 in the premium change clause as the last year mentioned by name indicated that Ætna contemplated that the contract would remain in effect at least until that date, the district judge declared that the mention of the year 1974 in the change of rate clause in the contract before him as the last date mentioned by name gave like significance to that date. So declaring he took the year 1974, or forty years after its signing, as the reasonable time during which the contract should and would continue in effect and entered judgment accordingly.

Appealing from that judgment, Ætna, attacking the rulings and judgment of the district judge, is here presenting five questions for decision,[4] and urging as to each that the answer should be in the affirmative.

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[4] These are:

I. Whether this case should not have been transferred to the United States District Court for the Southern District of New York under Sec. 1404(a) of the Judicial Code (28 U.S.C.A. 1404(a)).

II. Whether, if the Freeport case stands, under its authority Ætna should not be relieved from writing annuities for all employees except such as became eligible for coverage prior to August 1, 1954, the twentieth anniversary of the contract.

Addressing myself to each of these in turn, I think it sufficient to say of the claim of error implied in question one that, in my opinion, it is without substance. To appellant's claim that only New York judges are competent to determine what is New York law, and that, since the contract was a New York contract, the case should have been sent to New York for trial, a claim which on its face seems most provincial, appellee opposes the admitted facts, that plaintiff is a Texas corporation with its prncipal office and place of business and the great majority of its employees

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In this connection Ætna states: "The District Court correctly considered itself bound by the decision of this Court in Freeport Sulphur Co. v. Ætna Life Ins. Co. (7-24-53) 206 F. (2) 5, 41 A.L.R. (2) 762, but it misconstrued that decision and erred in not holding that a reasonable time for the termination of the contract as to new employees was 20 years from inception, as was held in the Freeport case."

III. Whether Ætna is not entitled to a trial on the fact question, or the mixed question of fact and law, as to what is a reasonable time, so as to make it improper to have entered a summary judgment against Ætna in any event.

IV. Whether, upon a reconsideration of this whole problem, this court should not now overrule the reasoning of the Freeport case and hold (a) that the contract, lacking any fixed or ascertainable term, is terminable at will in its executory features after such time elapses as to show good faith at inception, and that such time (17 years) had elapsed as a matter of law at maturity of Ætna's first notice of termination dated 6-30-50; (b) that the contract lacks consideration or mutuality, and has become unfairly discriminatory contrary to applicable statutes of both New York and Texas, and that it is therefore terminable insofar as it remains executory, and was so terminable at the time defendant served its first notice of June 30, 1950; and (c) that if the so-called "reasonable time rule" applies in determining when new employees may be excluded, that time had expired long before any notices of termination were served or matured in this case.

V. Whether the District Court did not err in refusing to hold that Ætna was entitled to cease writing new annuities on all employees, both old and new, as of Dec. 23, 1959, at which time there was expiration of the charter of Texas Gulf which was in existence and non-renewable at the time the Group Annuity contract was executed.

in the Southern District of Texas, and the further fact that the same questions here presented for decision have already been decided in this circuit.

Of the claim presented in plaintiff's question four, that this court should in this case reconsider and overrule the decision in the Freeport case, it need only be said that we regard that case as having been correctly decided and are content with the decision.

Of the error implicit in question five, it is sufficient, I think, to say that for the reasons here after briefly stated and more fully developed in the brief of appellee, the contention that, because Texas Gulf's charter as it existed in 1934 would have expired in 1959, unless amended, it should be held that the contract expired in that year, is completely unmeritorious.

There is no evidence showing or tending to show that Ætna knew of the expiration date of Gulf's charter, therefore none that the fact that it was for a limited time entered at all into the consideration of the parties in negotiating for and in entering into the contract. There is certainly no more of merit in Ætna's contention that the original time limit of Gulf's charter fixed or determined the time of the termination of the contract than there was for Freeport's insistence in its case, an insistence which the trial court and this court rejected out of hand, that because its charter was a perpetual one, it must be held that its contract was in perpetuity.

It is settled law that a corporation is not limited to contracting obligations which must be completed before the expiration of the corporate life, and in 13 American Jurisprudence, "Corporation", "Power to Contract", Sec. 810, p. 823, it is said: "The mere fact that a corporate contract may extend beyond the term of the life of the corporation does not destroy it."[5] Besides the Legislature in 1937, by

[5] Cases to the same effect are Detroit v. Detroit Citizens, 184 U.S. 368; City of Minneapolis v. Minneapolis Street Railway,

the adoption of Art. 1315(a) R.C.S., provided a method for the extension of charters, and, pursuant thereto, Texas Gulf's corporate life was, on Dec. 15, 1951, extended to Dec. 23, 2009, giving it an additional fifty years.

When it comes, however, to question two and the error it presents, that, though holding that the Freeport decision was controlling in this case, the district judge, by designating August 1, 1974, a date twenty years later than the date fixed in that decision, as the date after which Ætna could discontinue writing new coverages at the stipulated premium rates, had failed to give it proper application, it seems clear that appellant is right and that the judgment should be modified.

I am of this view, not only because the evidence, in my opinion, affords no rational basis for any substantial distinction between this case and Freeport's case, but because the evidence in this case, as it did in Freeport's case, compels the conclusion that under the undisputed facts in both cases, Ætna could not as a matter of law be compelled to write new coverages under the rate limitations of its contract after its twentieth anniversary, April 1, 1954, in Freeport's case, August 1, 1954, in Gulf's.

This clearly and plainly results, I think, from the provision of the contract giving Ætna the right during successive periods to make limited increases in the premium rates, and from the fact that the key to Ætna's obligation under the contract in each case is to be found in that clause of the guarantees to the employer, providing that the original pension premium rates may not be increased by more than a specified percent in any period, five years in Freeport's, and ten years in Gulf's, contract, "entered upon" after the first five years in Freeport's, and the first ten in Gulf's contract.

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215 U.S. 417; Peoples v. O'Brien, 18 N.E. 692; N.Y. Central v. City of New York, 95 N.E. 638; Miner v. N.Y. Central, 123 N.Y. 2421, 25 N.E. 339.

The naming of the specific dates, note 3 *supra*, in each contract was without controlling influence on the overall time the contracts might be continued. The stated dates for the first three periods in each case, as well as the unstated ones, provided for by the "et cetera" provision, were merely hypothetical periods based upon the expectation, not that Ætna must, but that Ætna might,[6] still be issuing new coverages under the contract as each respective period opened, and they operated not to compel it to enter upon such periods but to oblige it if it entered upon each particular period to continue without change during that period the rate fixed for it.

The twenty year difference in the projection of stated dates came about in a very simple, way. In the Freeport contract, effective April 1, 1934, it was provided that the rates for employees who came into the contract during the first five years could never be raised, but for all other employees the rates could be increased 7½ per cent of the original rate in April 1, 1939, increasing by 2½ percent of the original rate every five years thereafter. The 1939 increase would apply only to new employees because those employees who had already entered the plan were exempt, but the 1944 and subsequent five year increases would apply to the future premiums of all employees who had come into the plan since 1939 or should come into it after that date.

By August 1, 1934, when the Texas Gulf contract became effective, Ætna was no longer willing to exempt from increases the employees entering the plan during the first five years. But perhaps with a will to make up to Texas Gulf in a measure for the denial of this valuable exemption no longer available to anyone, Ætna, as is shown in note 3, *supra*, agreed to an escalation scale fixing the successive periods which might be entered upon at ten years and the percentages of the successive escalations in each period "entered upon" at five instead of 2½ percent.

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[6] Cf. what is said in Coffin v. Landis, 46 Pa. 426, at 432-3.

Aware, as we were, of the focus of attention on the provisions in the proposal for guarantees and in the contract itself, that the dominant consideration for entering into the contract was the fixing of these guarantees[7] so that Ætna could not step the rates up at its will and pleasure, this court, in its opinion in the Freeport case and in explanation

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[7] Counsel for appellee in his brief on pages 55 to 58 take note of the great significance and importance of the premium guarantees, and thus points them up:

"To refer again to the formal proposal submitted in May 1934, the following guarantee is found also under the heading, 'THE GUARANTEES TO THE EMPLOYER', and sub-heading, 'Guarantee of Premium Rates': 'Pension premium rates are guaranteed against increase for 10 years from the date of the contract. The basic pension premium rates may not be increased by more than 5% for *each 10 year period entered upon after the first ten years.*'

"*The importance of this premium guarantee must not be underestimated.* In the group annuity contracts issued today, Ætna Life Insurance Company reserves the right, after a specified time, to make any increases desired in premiums, chargeable to old and new employees alike, thus providing the insurance company with an effective escape clause. In the group annuity contracts issued prior to April, 1934, a provision was usually inserted reserving the right to make any desired change in the premium rate of new employees entering the plan after a stated number of years following its execution. This type of provision was also an effective means of escape since it permitted the insurance company to so increase the premiums on new employees that the employer would be forced to cancel the contract."

* * *

"*There can be no doubt that these definite premium guarantees played a decisive role in the success of Ætna in selling the contract to Texas Gulf.* * *"

* * *

"*In the final drafting of the contract as executed, the parties were careful to see that the aforementioned premium guarantees were carried forward and made a part of the contract.* If these premium guarantees, which were considered by both parties to be the decisive reason for placing the contract with Ætna, together with the other statments found in these preliminary negotiations, are to have any meaning, the contract must be continued at least through 1974." (emphasis supplied)

of our refusal to approve the district judge's findings of fact in a summary judgment case and our determination as matter of law that Ætna would have the right at the end of the third of the rate increase periods, expiring on March 31, 1954, to cease writing new coverages on that date, declared:

> "We differ with the district judge only as to what is a 'reasonable time' for the operation of the contract. We think 25 years is too long. Since April 1, 1934, economic conditions have radically changed, interest rates have sharply declined, and life expectancy has substantially lengthened. All these things enter into the rates to be charged for such a policy as this.
>
> "In reserving the right to modify the premium rates on this policy, however, Ætna specifically provided for increased in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date."[8]

It is this latter paragraph in the opinion, and this paragraph alone, which is responsible for the fact that the cause was decided below on the basis of a period of forty years rather than, as was decided in Freeport's case, that twenty years was the limit and, though it was certainly not written with the specific intent that it should form the controlling basis for the decision, it is as certainly true: that, both in what was said and in what was left unsaid, it was and is misleading, and that the fault for the district judge's decision in this case cannot be ascribed to him.

On the contrary, it must be laid at the door of our opinion in apparently pointing, as a guide to the decision of the

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[8] In its petition for rehearing, Freeport, realizing the apparent inconsistency in pointing as a limitation upon the contract to the stated date, March 31, 1954, and seeking to turn it to the account of the claim it had already labored in vain with the district judge, that the stated time dates had no significance in fixing the total time the contract was to run, put the matter thus:

question, to the last date specifically mentioned in the premium guarantees rather than, as should have been done, to the significance of the date as the ending of one of the series of five year periods beginning in 1939, and then pointing out more clearly than we did that, having actually entered upon the third period, Ætna could not, as matter of law, complain of being required to continue writing new coverages until its end.

Applying the same rule to Gulf's contract, which provided for ten instead of five year periods and began the periods in 1934, I think it must be held in this case that, having given notice within the second period, that it did not intend to enter upon another ten year period, though Ætna could not complain of being required to continue writing new coverages until the end of that period, it could cease to do so at its end.

The district judge, in the Freeport case, where the argu-

"The majority opinion is inconsistent with itself because, while recognizing the significance of the enumeration of time periods in the rate limitation clause in the policy, the opinion ignores the fact that the enumeration is followed by the highly important words 'et cetera'. Without any reason the majority opinion denies any effect to these words and thus deletes them from the policy or makes them meaningless.

"In the majority opinion the court states:

"In reserving the right to modify the premium rates on this policy, however, Ætna *specifically* provided for increases in rates through Mar. 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date.'

"It is true that the rate limitation clause specifically referred to a series of five-year periods ending March 31, 1954, but it is no less true that this reference was followed by the words et cetera'. If the inclusion of the date 'March 31, 1954' signified that the contract would remain in effect at least until that date, as the Court has held, the use of the words 'et cetera' must necessarily have signified that Ætna contemplated that the contract would remain in effect beyond that date. We have contended that the use of those words contemplated several five year periods after 1954, the last date mentioned, but it can hardly be denied that they necessarily require at least one such period — otherwise 'et cetera' is given no meaning at all. Would anybody reading

ment was vigorously pressed upon him by Freeport that, by provisions for indefinite succession of these five year steps, the parties had indicated an intention that the contract would continue over the long period of time which the "et cetera" clause provided for, carefully pointed out that, by the very indefiniteness of continuation of these periods, the parties had made it plain that the provision for successive periods was not intended to, it did not furnish a guide to the determination of the overall time the contract would last.

While I agree with the district judge in the Freeport case, and with Freeport's counsel in its motion for rehearing, that the periods marked off by specific dates are of no more significance in the determination of the overall reasonable time for its ending than those periods introduced by "et cetera", I am convinced that in the provisions for the successive periods is to be found the key to the decision of Freeport's case and of this one. This key is that in Freeport's case each five year period entered upon after 1939, and in Gulf's each ten year period entered upon after the making of the contract, represents, it is, the reasonable time for the continuation of the contract during which Ætna

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the contract in 1934, and seeing the term 'et cetera' have supposed that Ætna could stop covering new entrants in 1954?

"Lord Coke observed a long while ago that 'an et cetera doth imply some other necessary matter'. See Bagley v. Rose Hill Sugar Co., 111 La. 249, 35 So. 539, 548 (1903) where the Court in considering the effect of the words 'et cetera' ('etc.') quoted with approval the Century Dictionary to the effect that these words are used when more instances of the same sort might have been mentioned but are omitted for brevity. Beers, Ætna's Vice President who negotiated the contract for Ætna, in his deposition in effect conceded that the purpose of the use of the words 'et cetera' was to eliminate the necessity of continuing to recite further specific periods ending, e.g., Mar. 31, 1959, March 31, 1964, March 31, 1969, et cetera.

"By the same reasoning, therefore, by which the Court properly concluded that Ætna's obligation to cover new entrants must continue until Mar. 31, 1954, the court cannot avoid the conclusion that the obligation must continue at least five years beyond that time. Otherwise the court reads the word 'et cetera' out of the contract."

may be compelled to continue writing new coverages at the specified rates. This is to say that in contracting with Gulf Ætna intended to, and did, bind itself that as each successive period was entered upon it would be bound for that period not to change the rates and, per contra, that while Ætna, after entering upon the period between 1944 and 1954, would not, by giving notice of its intention to cease writing new coverage at specified rates, have the right to depart from these rates before the period was over, it would be allowed to do so at its end.

Holding, then, as matter of law, that Ætna was bound by its entry in 1944 upon the ten year period from 1944 to 1954, to continue to write new coverage during that period at the rates fixed for it, but that, having before entering upon the next ten year period beginning August 1, 1954, announced its intention to cease writing at the rates fixed for that period, it was entitled to do so at its end.

I CONCUR in the decision of the majority that the judgment should not be affirmed as written but should be modified. Of the opinion, however, that it should be modified to designate August 1, 1954, as the date upon which Ætna had the right to discontinue the contract as to new coverages at the rates fixed for successive periods, I DISSENT from the opinion of the majority designating August 1, 1964 as the cut off date.

[SEAL]
A True Copy:
Teste:

JOHN A. FEEHAN, JR., *Clerk*
By CLARA R. JAMES
Clerk of the United States Court of
Appeals for the Fifth Circuit.

TEXAS GULF SULPHUR COMPANY,

v.

ÆTNA LIFE INSURANCE COMPANY,

June 8, 1955

141 Fed. Supp. 84

Memorandum:

On August 1, 1934, Texas Gulf Sulphur Company, engaged in mining sulphur (hereinafter called "Texas Gulf"), and the Ætna Life Insurance Company (hereinafter called "Ætna") entered into a "Group Annuity Contract" covering numerous employees of the Texas Gulf, which was then, has since been, and is now engaged on a large scale in the mining and production of sulphur in Texas. Such Contract appears to be plain and unambiguous, *except as to the time of its termination.*

Differences arose between the parties as to the time of termination, and this suit was instituted January 29, 1953, by Texas Gulf against Ætna seeking declaratory judgment construing such Contract and certain notices as to its termination given thereunder and finding and fixing such time of termination, etc.

Texas Gulf is a corporation organized under the laws of Texas, and Ætna is a corporation organized under the laws of Connecticut. They are citizens of different states, and there is jurisdiction here under Section 1332, Title 28, U.S.C.A.

Each, Texas Gulf and Ætna, have moved for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure, and have filed affidavits, depositions, exhibits, etc., which with the other papers constitute the record in the case. This is a hearing of both such Motions for Summary Judgment on oral argument and briefs, Disposition of such Motions will dispose of the case.

1. At the time (August 1, 1934) this Contract was entered into between Texas Gulf and Ætna, there was in existence between Ætna and Freeport Sulphur Company, engaged in the productions of sulphur in Texas and Louisiana, a similar Contract dated *April 1, 1934* (referred to as Freeport Contract) *in which, as here, the time of termination was not fixed.* Differences arose between the parties to the Freeport Contract resulting in litigation, a history of which may be found in Freeport *Sulphur Company* v. *Ætna Life Insurance Company,* 107 F. Supp. p. 510, and the majority and dissenting opinions 206 F. (2d) p. 5 (5th Circuit). The Contract here is substantially the same as the Freeport Contract, the facts in this case and in that case are quite similar, and most of the questions raised here are settled by the opinions in that case. A lengthy discussion here of the authorities cited by the parties seems unnecessary.

2. Following the ruling in the Freeport Case, it must be held that the Contract here is a continuing option given Texas Gulf which is not terminable at the will of either party, not void for lack of mutuality, not discriminatory under the laws of either Connecticut or Texas, and not a perpetual one. It should be and it is said here, as was said of the Freeport Contract by the trial judge in the Freeport Case and approved by the Court of Appeals: "Since no term for the option is provided in the contract, it is terminable after a reasonable time."

Judge Russell, in his dissenting opinion in the Freeport Case, puts it this way:

> "Generally, where the parties to a contract fail to specify a definite term for its continuance, with the result that the judicial process must be resorted to in order to determine a 'reasonable time' which should elapse before it is terminated, the primary effort of the courts is to determine the time which, as reasonable men, the parties to the contract ought to have understood each other to have in mind at the time the con-

tract was executed, but which time was, nevertheless, for some reason, omitted from the contract."

This Court is, therefore, called upon as the Courts were called upon in the Freeport Case to determine what is a reasonable time for the contract here to run from and after its date, August 1, 1934. In order to so determnie, the Court will look to the situation of the parties and their negotiations prior to the date of the Contract, the Contract itself, and the action of the parties under such Contract since its date.

3. The situation of each and the negotiations between Texas Gulf and Ætna prior to the date of the Contract is fully shown by the Record, but no good purpose would be served by discussing it in detail here. However, an examination thereof shows that Texas Gulf had long desired and needed to have a long range retirement, pension or annuity plan for its then and future employees, and that Ætna knew of such desire and need and was willing to meet it. In the negotiations between them, through their officers and agents, carried on in personal interviews and by correspondence extending over a period of many months, substantially every phase of the Contract was discussed and the views and desires of each made clear to the other. This discussion included the matter of the premium rates and necessary changes therein during the period of a long range contract. It also included the matter of the termination of the Contract. It would be unreasonable to say that either party overlooked or ignored so vital a question as the time of termination in a contract so important.

4. What light does the Contract itself throw upon the question?

The suggestion that the contract should be construed against Ætna because prepared by Ætna does not, under the facts, appeal to me. But it is unusual that Ætna should

execute and put in force within a few months two contracts (the Freeport Contract and this one) with no definite date of termination fixed in either. This, however, throws little or no light on the question we have here.

On the question of a reasonable time under the Freeport Contract, the trial judge said (107 F. Supp. 513):

> "What is a reasonable time must be determined from all the circumstances of the case, and this court, after a study of all the circumstances as reflected in the record, concludes that a reasonable time would be twenty-five years from the date of the contract. Holt v. St. Louis Union Trust Co., supra; Bach v. Friden Calculating Mach. Co., supra; Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc. supra."

The trial judge thus found twenty-five years from the date of that Contract to be a reasonable time thereunder, but in the majority opinion of the Court of Appeals this time is reduced to twenty years from the date of the contract.

It is said in the majority opinion (underscoring mine):

> "We differ with the district judge only as to what is a 'reasonable time' for the operation of the contract. We think 25 years is too long. Since April 1, 1934, economic conditions have radically changed, interest rates have sharply declined, and life expectancy has substantially lengthened. All these things enter into the rates to be charged for such a policy as this.
>
> In reserving the right to modify the premium rates on this policy, however, Ætna *specifically* provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date.
>
> In the absence of a specific provision as to duration, which Freeport could have insisted upon, and in view of substantially changed conditions already referred to, we regard 20 years as a reasonable period of duration, after which Ætna is entitled to *discontinue new cover-*

ages. Compare Texas & P. Ry. Co. v. City of Marshall, 136 U.S. 393, 10 S. Ct. 846, 34 L. Ed. 385."

The modifying clause in the Freeport Contract referred to by both Courts is as follows (underscoring mine):

> "* * * provided that at no time between *April 1, 1939 and March 31, 1944* shall premium rates be established which are more than 7½% greater than the original rates, at no time between *April 1, 1944 and March 31, 1949* shall premium rates be established which are more than 10% greater than the original rates, at no time between *April 1, 1949 and March 31, 1954* shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates increasing by 2½% of the original rates for each *five year* period entered upon thereafter."

A similar clause in the Contract here is as follows (underscoring mine):

> "The Company reserves the right, upon three months' written notice to the employer, to modify any one or more of the following at any time after this contract has been in force ten years:
>
> • • •
>
> (c) The premium rates in Tables A, B and/or C provided, however, that at no time between *August 1, 1944*, and *August 1, 1954*, shall premium rates be established which are more than 5% greater than the original rates, at no time between *August 1, 1954* and *August 1, 1964* shall premium rates be established which are more than 10% greater than the original rates, at no time between *August 1, 1964* and *August 1, 1974* shall premium rates be established which are more than 15% greater than the original rates, et cetera, *the maximum permissible difference between the new rates and the original rates increasing by 5% for each ten year period entered upon thereafter.*"

Using the same process of reasoning here as there, it seems clear that Ætna itself contenplated that the Contract here would remain in effect at least until August 1, 1974, or a period of forty years from its date.

Texas Gulf presses upon me that under the language so quoted from the majority opinion the finding here should be that Ætna contemplated that this Contract should remain in effect until 1984, or a period of fifty years. I do not think this view is meritorious.

On the other hand Ætna says that Judge Strum's language quoted is with respect to the coverage of old employees and not the coverage of new employees. This is, I think, clearly incorrect.

Ætna also says:

> "It is regrettable that Judge Strum included the paragraph under discussion in an opinion that otherwise shows a firm grasp of the facts as to the workings of Group Annuity Contracts, because it can be clearly demonstrated that the statement was inadvertment, superficial, and erroneous, etc."

Both Judge Strum who wrote the majority opinion and the Judge (Hutcheson) who concurred therein, are well known for the accuracy and clarity of their opinions, and I do not agree with this view of Ætna.

Aside from the views of the Judges as set forth in the opinions in the Freeport Case, a comparison of the clause of this Contract quoted above with respect to premium rates with the similar clause in the Freeport Contract makes it clear, I think, that both contracts are long range contracts, and this Contract is a longer range contract than the Freeport Contract, and was so intended by the parties.

Again, considering this Contract in its entirety and from its "four corners" leads to the conclusion, I think, that the parties intended making a contract of long duration.

5. Looking now to the actions of the parties under and in carrying out this Contract.

From 1934 to 1950, about fifteen years, operations under this Contract went forward without complaint from Ætna, even though Ætna knew it was unprofitable for it. It was

not until 1950 that Ætna gave Texas Gulf notice of its claim of the right of termination. The facts shown by the Record of such fifteen years' operations under such Contract do not, I think, help Ætna in its present claim that the parties had in mind a short range contract.

6. But, Ætna says that the Texas charter of Texas Gulf expired December 23, 1959, and that the parties intended December 23, 1959, to be the date of termination of this contract, etc.

The facts are that during the negotiations for, and at the time of execution of this Contract, Texas Gulf's charter was, under the *then* provisions of the laws of Texas to expire December 23, 1959. However, the Legislature of Texas, by the Act of 1937 (now Article 1317(a), Laws of Texas) made provisions for the extension of the life of such corporation, and on December 15, 1951, Texas Gulf's corporate life was extended to December 23, 2009.

My conclusion is that in view of such facts the contentions of Ætna are not meritorious.

7. My findings and conclusions are that since no time for the termination of this Contract is fixed, it is terminable after a reasonable time, and a reasonable time would be forty years from and after August 1, 1934, i.e. that Ætna may discontinue the Contract as to new coverage on August 1, 1974. Also that any notice or notices given Texas Gulf by Ætna to the contrary are to no effect.

It follows from what has been said that Texas Gulf's Motion for Summary Judgment should be granted, and Ætna's Motion for Summary Judgment should be denied. That Declaratory Judgment should enter in accordance with this Memorandum.

Let appropriate Decree be drawn and presented.

/s/ T. M. KENNERLY
United States District Judge

FREEPORT SULPHUR COMPANY,
Appellant & Appellee,

v.

ÆTNA LIFE INSURANCE COMPANY,
Appellee & Appellant.

(AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

(July 24, 1953.)

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206 F. (2D) 5

Before HUTCHESON, Chief Judge, and RUSSELL and STRUM, Circuit Judges.

STRUM, Circuit Judge: This action was instituted by Freeport Sulphur Company to determine, by declaratory judgment, the period of duration of the contract hereinafter described, and for incidental relief. 28 U.S.C.A. 2201, 2202.

Freeport is engaged in the mining of sulphur in Louisiana and Texas. In 1933, it desired to institute a pension plan for the benefit of its then and future employees, and those of its affiliated companies, by which annuities would be provided for said employees when they reached the age of retirement. To this end, beginning in August, 1933, Freeport commenced negotiations with the defendant Ætna Life Insurance Company, and another company, seeking to formulate a satisfactory group annuity plan. After spirited

competition, the business was awarded to Ætna, which issued a group annuity contract dated April 1, 1934.

Under the policy, employees who had been in the employ of Freeport, or its affiliates, for one year or more, and new employees after one year of employment, who had not attained the age of 65 years for men, 60 years for women, could apply for, and Ætna would issue to them, annuity policies maturing at stated ages, upon the payment by Freeport of designated premiums, provided the employees remained in the employment of Freeport, or its affiliates, until their normal retirement age.

The contract obligates Ætna to cover every qualified employee who makes application to the employer (not to Ætna), and for whom the required premium is paid. Coverage becomes effective as to each such employee when Freeport gives notice to Ætna that an application therefor has been made by the employee to the employer. Thus, coverage is vitually automatic upon the application of a qualified employee. Ætna is not authorized to reject any such application, so long as the employee is eligible under the terms of the master contract. Premiums are paid annually by Freeport, which partially reimburses itself by deductions from the pay of the participating employees, both employer and employee bearing a portion of the cost. Ætna reserved the right to modify the premium rates from time to time after the first five years of operation of the policy, by increasing the rates by not more than 7½% of the original rate for the period 1939-1944, and further increases of not more than 2½% for each additional five year period. See note 1, post. Ætna exercised these rights at the expiration of each five year interval.

The contract remained in force without interruption from April 1, 1934 until November 23, 1949, about 15½ years, when Ætna notified Freeport that after January 1, 1950, no new coverages would be issued under the contract. This amounted to a cancellation of the contract as to new coverages, but did not undertake to affect or impair the

rights of employees already covered. It was this notice which precipitated this controversy.

The contract is unambiguous, except that it does not specify how long it shall remain in effect. The absence of such a clause is the basis of this suit. Freeport contends that the contract remains in effect perpetually, so long as premiums are paid. Ætna claims that the contract is terminable at will by either party, insofar as it remains executory, that is, as to future coverages, but concedes that the rights of employees already covered cannot be impaired. The district judge accepted neither contention, but held that the contract is terminable by Ætna upon notice, after a reasonable time, which he determined to be 25 years after its inception, which would be April 1, 1959, thus leaving a further effective period of approximately 6½ years from the date of the decree below. 107 Fed. Supp. 508. Both parties appeal from those portions of the decree adverse to them.

In reaching his conclusions as to the interpretation and effect of the contract, the district judge thus correctly stated the law: "This employees' group annuity policy is a unilateral contract, an exchange of a promise for an act, a situation in which the insurer, in consideration of the annual payment of the premium by the employer, gives the employer, amongst other things, a continuing option to purchase annuities for its new employees at the price fixed in the contract. Such an option is not terminable at will by the insurer. Since no term for the option was provided in the contract, it is terminable after a reasonable time. Reinstatement, Law of Contracts, secs. 24, 47; Williston on Contracts, Revised Edition, Vol. 1, secs. 38, 61; *Holt* v. *St. Louis Union Trust Co.*, 4 Cir., 52 Fed. (2) 1068; *Bach* v. *Friden Calculating Mach. Co.*, 6 Cir., 155 Fed. (2) 361; *Cohen & Sons, Inc.* v. *M. Lurie Woolen Co., Inc.*, 232 N.Y. 112, 133 N.E. 370; *Pope* v. *Terre Haute Car & Mfg. Co.*, 107 N.Y. 61, 13 N.E. 592. * * * One effect of Freeport's performance under the contract is to give Freeport an option to purchase for its new employees annuities pursuant to the

contract. The consideration supporting the contract also supports the option which is one of the terms of the contract." Of course, the contract would "discontinue" at any time Freeport ceased paying the required premiums.

We agree with the foregoing conclusions of the district judge, as well as his conclusion that the contract should be interpreted according to the laws of New York, where it was delivered to Freeport and became effective, after having been submitted to, and approved by, the Superintendent of Insurance of that state. *N. Y. Life Ins. Co.* v. *Chapman*, 8 Cir., 132 Fed. (2) 688; *Mutual Benefit Health & Acc. Assn.* v. *Kennedy*, 5 Cir., 140 Fed. (2) 24; *Order of U.C.T.* v. *Meinsen*, 8 Cir., 131 Fed. (2) 176; 11 Am. Jur. 386(100). Compare *Boseman* v. *Conn. Gen. Life Ins. Co.*, 301 U.S. 196; 81 L. Ed. 1036; *Transit Bus Sales* v. *Kalamazoo Coaches*, 6 Cir., 145 Fed. (2) 804; *Pasquel* v. *Owen*, 8 Cir., 186 Fed. (2) 263; *Newspaper Readers Service* v. *Canonsburg Pottery Co.*, 3 Cir., 146 Fed. (2) 963; *Cockburn* v. *O'Meara*, 5 Cir., 141 Fed. (2) 779.

We also agree with the district judge that the contract is not illegally discriminatory under sec. 209 of the New York Insurance Law, Consol. Laws, chap. 28, which prohibits any insurance company doing business in that state from making "any unfair discrimination between individuals of the same class" in the purchase of life insurance or annuity contracts. See also Louisiana Rev. Stat. 1950, Title 22, secs. 652, 1214.

The district judge also correctly held that the contract was not void for lack of mutuality. The doctrine of mutuality is inapplicable here. It should be borne in mind that because of the distinctive characteristics which inhere in insurance contracts of this nature, cases relating to other types of contracts are usually inapposite upon the question of mutuality.

We differ with the district judge only as to what is a "reasonable time" for the operation of the contract. We

think 25 years is too long. Since April 1, 1934, economic conditions have radically changed, interest rates have sharply declined, and life expectancy has substantially lengthened. All these things enter into the rates to be charged for such a policy as this.

In reserving the right to modify the premium rates on this policy, however, Ætna *specifically* provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date.[1]

In the absence of a specific provision as to duration, which Freeport could have insisted upon, and in view of substantially changed conditions already referred to, we regard 20 years as a reasonable period of duration, after which Ætna is entitled to discontinue new coverages. Compare *T. & P. Ry. Co.* v. *City of Marshall,* 136 U.S. 393, 34 L. Ed. 385. Perpetual contracts, though sometimes sanctioned, are not favored in the law. A construction of a contract conferring a right in perpetuity will be avoided unless compelled by

[1] The policy provides, *inter alia,* that "The company also reserves the right * * * to modify the premium rates in Tables A and B to be used in the calculation of premiums with respect to employees whose coverage hereunder commences five years or more after the date of this contract; provided that at no time between April 1, 1939 and March 31, 1944 shall premium rates be established which are more than 7½% greater than the original rates, at no time between April 1, 1944 and March 31, 1949 shall premium rates be established which are more than 10% greater than the original rates, at no time between April 1, 1949 and March 31, 1954 shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates increasing by 2½% of the original rates for each five year period entered upon thereafter; and provided further that no table of premium rates shall be established which results in a greater total premium than the table of premium rates then being used by the Company in the new Group Annuity contracts which it is then issuing providing similar benefits for employees in the same premium rate classification."

the unequivocal language of the contract. *Holt* v. *St. Louis Trust Co.*, 4 Cir., 52 Fed. (2) 1068; *Town of Readsboro* v. *Hoosac Tunnel Co.*, 2 Cir., 6 Fed. (2) 733. Of course, existing coverages as of March 31, 1954, are not affected, so long as premiums are paid.

Accordingly, the decree appealed from is modified so as to designate April 1, 1954, as the date upon which Ætna may discontinue the contract as to new coverages. As so modified the decree is

AFFIRMED.

RUSSELL, Circuit Judge, dissenting:

I am unable to join my colleagues in directing modification of the judgment of the trial court which held that twenty-five years was "a reasonable time" during which the insurance contract, which expressed no term, should remain operative. Certainly Ætna Life Insurance Company is not entitled to complain of this period under all of the circumstances of the case. Generally, where the parties to a contract fail to specify a definite term for its continuance, with the result that the judicial process must be resorted to in order to determine a "reasonable time" which should elapse before it is terminated, the primary effort of the courts is to determine the time which, as reasonable men, the parties to the contract ought to have understood each each other to have in mind at the time the contract was executed, but which time was, nevertheless, for some reason, omitted from the contract. In the present case, consideration of the negotiations leading up to the insurance contract, the nature, terms and provisions of the contract as executed, and the purpose sought to be attained supports the finding of the trial court, if, indeed, the enforcement of a longer period would not have been justified. The insurer, having cautiously provided, so far as it could foresee, for each and every contingency affecting its liability and the compensation it should receive for its

assumption, even to the extent of providing what it doubtless deemed to be protection in any and all events by its prescribed rate of increase in premiums during successive periods of five years each, which would equal, though not exceed, the prevailing rates which underwriting conditions indicated at any particular time, (see note 1 in the majority opinion), can properly be regarded, at the inception of the contract, as having desired and intended that it should continue for a long period of time. With favorable rates, a large insurer desires increases in amounts of insurance in force. Freeport, adopting the plan for its employees, may well be regarded as having had a similar understanding as to the existence of its option to insure new employees. The subsequent decline in interest rates and the increase in life expectancy, while they might make the contract burdensome for the time being, do not, I think, affect what must have been the understanding of the parties at the time the contract was executed.

I think the finding of the trial court is so well supported by the facts and circumstances of the case that the insurer has no cause for complaint.

A True copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

FREEPORT SULPHUR COMPANY

v.

ÆTNA LIFE INSURANCE COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

(September 10, 1952)

---

107 Fed. Supp. 508

Wright, District Judge:

This case presents for judicial determination an interpretation of an employees group annuity policy issued by the defendant to the plaintiff in behalf of its employees. The primary question to be determined is whether or not the contract, having no express term, is cancelable at will.

The plaintiff is engaged in the mining of sulphur. Its principal operations are in Louisiana and in Texas where the majority of its employees reside, but its executive offices are in the City of New York. It is chartered for perpetual existence by the State of Delaware. The defendant is an insurance company, chartered under the laws of the State of Connecticut with its principal offices is Hartford.

The contract or policy in suit was entered into in 1934 after a series of conferences between the parties in the City of New York and after an exchange of correspondence between New York and Hartford. Before being issued, by agreement of the parties, the contract was presented to the Insurance Department of the State of New York for

approval. After approval was obtained, it was mailed from Hartford to the plaintiff in New York.

Under the contract the insurer agrees to pay an annuity, after a certain age, to each employee of the plaintiff who applies for coverage. The consideration for the contract as recited therein is payment by the employer of annual premiums in advance, the employer subsequently to be partially reimbursed by payroll deductions from the employees participating.

No term is expressed in the contract. It is provided, however, that the premium rate as shown in the policy will remain unchanged for employees participating during the first five years, while as to employees applying for coverage after the first five years, increases amounting to not more than 2½% of the original rate for each five year period may be demanded, an increase in no event to result in a rate higher than the rates then being used by the company in new group annuity contracts providing similar benefits.[1]

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[1] "The Company also reserves the right, upon three months' written notice to the employer, to modify the premium rates in Tables A and B to be used in the calculation of premiums with respect to employees whose coverage hereunder commences five years or more after the date of this contract; provided that at no time between April 1, 1939 and March 31, 1944 shall premium rates be established which are more than 7½% greater than the original rates, at no time between April 1, 1944 and March 31, 1949 shall premium rates be established which are more than 10% greater than the original rates, at no time between April 1, 1949 and March 31, 1954, shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates increasing by 2½% of the original rates for each five year period entered upon thereafter, and provided further that no table of premium rates shall be established which results in a greater total premium than the table of premium rates then being used by the Company in the new Group Annuity contracts which it is then issuing providing similar benefits for employees in the same premium rate classification."

The contract was in full force from April 1, 1934 until November 23, 1949, at which time Ætna advised Freeport that after January 1, 1950 employees not then participating would not be covered under the group contract. In other words, Ætna gave notice of cancellation of the contract as to new employees without affecting the rights of employees already covered. This notice of cancellation followed a series of unsuccessful attempts on the part of Ætna to adjust the rate base provided in the contract upward as to new employees, the contract, because of softening interest rates and the increase of life expectancy, having become as to Ætna extremely onerous.

Plaintiff contends that the policy in suit is a perpetual obligation on the part of Ætna to provide the coverage stated in the policy. Ætna contends that the contract, being without term, is terminable by either party insofar as it is still wholly executory; that the contract, insofar as it is still wholly executory, lacks mutuality and hence is not binding upon either of the contracting parties; and that the contract, as construed as Freeport contends it should be, has now become discriminatory, and insofar as it is still wholly executory, its performance is prohibited by law.

At the outset it should be determined by what law the contract shall be governed. The resolution of this question is simple for the reason that the parties themselves by submitting the contract for approval to the Insurance Division of the State of New York have evinced the intention of having the law of that state apply to it. The intention of the parties will prevail. *Besaman* v. *Connecticut General Life Insurance Co.*, 301 U.S. 196, 202. There is nothing in the law or the jurisprudence of Louisiana which suggests a different conclusion. *Griffin* v. *McCoach*, 313 U.S. 498; *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487.

Insurance contracts are governed generally by the same rules of interpretation as are ordinary contracts, the cardinal rule being that effect should be given to the intention of the parties if it can be done consistently with legal

principles. If the intent of the parties is unambiguously expressed in the instrument itself, effect must be given to the expressed intent. The Court has no authority to revise a contract or to make a contract for the parties. Where the intent is not adequately expressed and cannot be discovered by a study of the entire instrument, resort may be had to the preliminary negotiations leading to the contract. Preliminary negotiations, however, cannot be allowed to contradict or to vary the terms of the written instrument, but may be used only to determine the intent of the parties. The manner in which the contract has been construed by the parties themselves may also be useful in determining intent, for the parties, by their acts pursuant to the contract, show what is meant by the contract. The rule that in case of doubt as to the meaning thereof a contract is to be interpreted against the party who drew it is applicable to insurance or annuity contracts.

In addition to these general rules of contract interpretation there is a further rule of particular importance to the contract in suit. An interpretation calling for perpetual performance of a contract should be avoided unless a contrary intention of the parties is manifest. Williston on Contracts, Revised Edition, Vol. 1, Sec. 38; *McCaffrey* v. *B. B. & R. Knight, Inc.*, 22 F. 334; *Town of Readsboro* v. *Hoosac Tunnel & W. R. Co.*, 6 F. 2d 733 (CCA 2); *Holt* v. *St. Louis Union Trust Co.*, 52 F. 2d 1068 (CCA 4). Perpetual contracts are not favored in the law, for perpetuity is a concept which eludes the grasps of the human mind.

Plaintiff, in its effort to support its position that the contract is a perpetual one in spite of the fact that no express term is provided, relies on the language of the contract itself and on the intention of the parties as expressed in the contract, in the negotiations leading up to the contract, and in the manner in which the contract has been construed.

Plaintiff's principal reliance is upon that portion of the contract which provides authority to increase the premium rate every five years as to new employees after the first five years. Plaintiff reasons from this provision that the parties intended the contract to cover new employees for all time to come. What plaintiff fails to realize is that this so-called escalator provision of the policy applies to employees now covered and who will continue to be covered. It, like the other provisions on which Freeport relies, would have been included in the contract even if Ætna had express authority to cancel. These provisions, therefore, cannot necessarily mean that the parties intended that the benefits of the contract would be available to new employees of Freeport ad infinitum.

Plaintiff seeks to prove an intention on the part of the parties to enter into a perpetual contract from the exchange of letters between the parties prior to its execution, together with statements made by officers of Ætna during this confection period. The Court has studied those letters and the affidavits outlining the various statements. From this study it is convinced that the parties intended to enter into a contract which would be of long duration, but nowhere in any of the letters or in any of the statements is there any indication whatever that the parties had in mind a perpetual contract. In fact, as far as appears from the record, the officials of Ætna were without knowledge that Freeport's charter was a perpetual one.

Plaintiff also relies on the manner in which the parties have construed the contract as tending to prove it is of perpetual duration. It is true that the actions of the officials of Ætna indicate clearly a conviction on their part that Ætna was bound by the contract, but again nowhere is there any indication whatever in any of their actions that Ætna's obligation under it would last forever.

The details of the contract in suit were worked out in conferences and by correspondence between the representa-

tives of the two parties. Consequently, the rule of strict construction against the insurer need not necessarily be applied. Even if that rule be applied, however, there would still be nothing in this contract or in the circumstances surrounding this contract from which can be implied an intention on the part of the parties that it be eternal. There is nothing ambiguous about the contract. It just does not have an express term and nothing can be gleaned from the contract itself or from the intention of the parties which supplies this deficiency.

Plaintiff in support of its position relies on a series of cases involving interpretation of contracts which are silent as to duration.[2] In most of these cases, however, the contracts in question were either fully performed on one side or the party seeking specific performance had suffered a severe detriment such as the outlay of large sums of money pursuant to the contract. In such cases some Courts have held the contracts to be of perpetual duration. No such case is presented here. Freeport has agreed only to pay annual premiums in advance and it has paid those premiums. If the contract in suit is no longer in force as to new employees, then no premium covering new employees will be included by Freeport in its annual payments. As to new employees Freeport will be required to make other arrangements, if it desires to offer them annuity coverage.

It would appear clear, therefore, that this contract is not one of perpetual duration. Ætna then suggests that since the contract cannot be construted to be perpetual and since it has no definite term, it is cancellable at will by either party. Ætna cites many cases from New York and else-

[2] Franklin Tel. Co. v. Harrison, 145 U.S. 459; McKell v. Chesapeake & Ohio R. Co., 175 F. 321 (CCA 6), aff'd on Rehearing 186 F. 39; Western Union Tel. Co. v. Pennsylvania Co., 129 F. 849 (CCA 3); Manners v. Morosco, 258 F. 557 (CCA 2); Llanelly Rwy. & Dock Co. v. London & Northwestern Rwy. Co., L.R. 8 Ch. 942.

where to support its position.[3] All of these cases, however, are clearly distinguishable from the case at bar. These cases involve employment contracts, agency contracts, commodity and service contracts. None of them involves an employees' group annuity contract nor any contract similar thereto.

This employees' group annuity policy is a unilateral contract, an exchange of a promise for an act, a situation in which the insurer, in consideration of the annual payment of the premium by the employer, gives the employer, among other things, a continuing option to purchase annuities for its new employees at the price fixed in the contract. Such an option is not terminable at will by the insurer. Since no term for the option is provided in the contract, it is terminable after a reasonable time. Restatement, Law of Contracts, Secs. 24, 47; Williston on Contracts, Revised Edition, Vol. 1, Secs. 38, 61; *Holt* v. *St. Louis Union Trust Co., supra; Bach* v. *Friden Calculating Mach. Co.*, 155 F. 2d 361 (CCA 6); *Cohen & Sons, Inc.* v. *Lurie Woolen Co., Inc.*, 232 N.Y. 112; *Pope* v. *Terre Haute Car & Mfg. Co.*, 107 N.Y. 61. What is a reasonable time must be determined from all the circumstances of the case, and this Court, after a study of all the circumstances as reflected in the record, concludes that a reasonable time would be twenty-five years from the date of the contract. *Holt* v. *St. Louis Union Trust Co., supra; Bach* v. *Friden Calculating Mach. Co., supra; Cohen & Sons, Inc.* v. *Lurie Woolen Co., Inc., supra.*

Before the enforcement of this contract can be required even for a reasonable time, however, Ætna's two remaining contentions must be disposed of. The first of these is that the contract lacks mutuality. Ætna asserts that the contract as written would bind Ætna to carry out its provisions

[3] Cronk v. Vogt's Ice Cream, Inc., 15 N.Y.S. 2d 649; Echols v. New Orleans R. R. Co., 52 Miss., 610; McGuire v. Nelson Bros., 177 La. 302, 148 So. 56; Sawman Oil Co., Inc. v. Bush, 136 S.W. 2d 938; Duff v. P. T. Allen Lbr. Co., 310 Ky. 439, 220 S.W. 2d 981.

whereas Freeport is at liberty to discontinue and cancel the contract at any time. The contract itself is silent on Freeport's right in this regard. It is clear, however, from the nature of the contract and from printed material relating to the contract prepared by Ætna and distributed by Freeport to its employees that there was no intention on the part of the parties to bind Freeport. This fact alone, however, does not relieve Ætna of its obligations under the contract. As shown above, this contract is composed of a promise in the form of the policy to pay annuities to employees of Freeport pursuant to the provisions of the policy, provided Freeport accepts the policy and pays the premiums annually in advance. Freeport did accept the policy and did pay the annual premiums in advance. Consequently, the promise of Ætna, acted upon by Freeport, constitutes a valid contract, at least to the extent that the contract has been executed. *Willard, Sutherland & Company* v. *United States*, 262 U.S. 489; *Howard* v. *Mercury Record Corp.*, 178 F. 2d 449 (CCA 5); 17 C.J.S. Contracts Sec. 100c. Ætna impliedly admits this result by challenging as without mutuality only the executory part of the contract while respecting its obligations under the executed portion.

One effect of Freeport's performance under the contract is to give Freeport an option to purchase for its new employees annuities pursuant to the contract. The consideration supporting the contract also supports the option which is one of the terms of the contract. *Cohen & Sons* v. *Lurie Woolen Co., supra; Warner-Quinlan Co.* v. *Smith*, 236 N.Y.S. 241, 255 N.Y. 582. Such is the sense of the contract and such was the intent of the parties. It is not void for lack of mutuality.

Ætna's last contention is that the contract insofar as it is still wholly executory has become discriminatory and therefore illegal. Ætna cites in support of its position Section 209 of the New York Insurance Law which provides in effect that an insurance company doing business in the

state cannot make or permit "any unfair discrimination between individuals of the same class" in the purchase of life insurance or annuity contracts. Section 1214 of the Louisiana Insurance Law is to the same effect. It is unchallenged that Ætna is now selling group annuities at higher premium rates than are included in the contract in suit. There is no showing, however, that this fact amounts to "unfair discrimination between individuals".

The contract in suit is a group annuity contract. Competition among insurers for group contracts is keen, and the insurer with the most attractive policy obtains the business. The premium rates charged by the same insurer vary from contract to contract. No attempt has been made by the states of New York or Louisiana to apply the discrimination statute to group annuity contracts. Certainly no standard premium rate has been set up in either state and the defendant itself apparently thought that the discrimination statutes were not applicable to this contract because immediately prior to the notice of cancellation it offered Freeport a new contract with a premium rate substantially less than the going rate. Under the circumstances this Court is reluctant to strike down the contract on the highly questionable theory that further performance thereunder may be in violation of these discrimination statutes.

There being no valid reason in law or equity why specific performance of the contract should not be enforced, on presentation of proper form of judgment it will be ordered.

J. Skelly Wright,
United States District Judge.

New Orleans, Louisiana, September 10, 1952.

STATUTES

New York Insurance Law:

"Sec. 209, Life, accident and health insurance; discrimination and rebating; prohibited inducements.

"1. No life insurance company doing business in this state shall make or permit any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums or rates charged by it for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof; and no such company shall knowingly permit, and no agent thereof shall offer to make or make, any contract of life insurance or annuity contract or agreement as to such contract, other than as plainly expressed in the policy issued thereon; and no such company and no officer, agent, solicitor or representative thereof, shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to any person to insure, or shall give, sell or purchase, or offer to give, sell or purchase, as such inducement, or in connection with any policy of life insurance or annuity contract, any stocks, bonds, or other securities of any insurance company or other corporation or business unit, or any dividends or profits accruing to or to accrue thereon, or any valuable consideration or inducement whatever not specified in such policy or contract; nor shall any person in this state knowingly receive as such inducement, any rebate of premium or any special favor or advantage in the dividends or other benefits to accrue on any such policy or contract, or knowingly receive any paid employment or contract for services of any kind, or any valuable consideration or inducement whatever which is not specified in such policy or contract * * *."

"Sec. 213. Life insurance and annuity business; limitations or expenses.

* * *

"11. No such company (i.e., domestic life insurance company or foreign or alien life insurance company doing business in New York) shall issue any life insurance or annuity contract which shall not appear to be self-supporting on reasonable assumptions as to interest, mortality and expense."

Texas Corporation Law:

Art. 1315(a) Vernon's Texas Civil Statutes:

"Subject to a finding by the Secretary of State as hereinafter provided, any private corporation organized or incorporated for any purpose or purposes authorized under this Title, at any time within ten (10) years prior to the expiration of its charter, or any extension thereof, may extend such charter and the corporate existence of such corporation for an additional period of not to exceed fifty (50) years from the expiration date of the original charter, or any extension thereof, with all the privileges, powers, immunities, right of succession by its corporate name, and rights of property, real and personal, exercised and held by it at such expiration date, to the same intents and purposes as upon original incorpation. The manner of extending any such charter shall be by a resolution in writing, adopted at any annual or special meeting of stockholders called for that purpose by stockholders holding a majority of the shares of capital stock of such corporation then outstanding, such resolution to specify the period of time for which the charter is extended, and a copy of such resolution, duly certified by the secretary of the corporation, under the corporate seal, shall be filed and recorded in the office of the Secretary of State. Upon the adoption of such resolution and the filing of a certified copy thereof with the Secretary of State, together with payment of the filing fee herein prescribed, the charter and corporate existence of such corporation may be extended for the additional period of time recited in such resolution. The filing fee to be paid for any such extension of a charter shall be such fee as said corporation would be required under the Statutes of Texas to pay in the event it was then apply-

ing for a new charter instead of extending its then existing charter.

Such extensions, however, may be made only in instances where the Secretary of State shall have found, after proper investigation, that such corporation in solvent and its capital unimpaired. Acts 1937, 45th Leg., p. 368, ch. 179, Sec. 1."

Art. 1320, Vernon's Texas Civil Statutes:

"Every private corporation as such has power:

1. To have succession by its corporate name for the for the period limited in its charter, not to exceed fifty years, and when no period is limited, for twenty years.
2. To maintain and defend judicial proceedings.
3. To make and use a common seal.
4. To purchase, hold, sell, mortgage or otherwise convey such real estate and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal, or mixed, or shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due, or belonging to, the corporation.
5. To appoint and remove subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.
6. To make bylaws not inconsistent with existing laws, for the management of its property, the regulation of its affairs and the transfer of its stock.
7. To enter into any obligation or contract essential to the transaction of its authorized business.
8. To increase or diminish, by a vote of its stockholders cast as its bylaws may direct, the number of its directors or trustees, such number, however, to be not less than three. Acts 1874, p. 120; G.L. vol. 8, p. 122; Acts 1907, p. 301; Acts 1909, p. 225; Acts 1923, p. 261; Acts 1929, 41st Leg., p. 303, ch. 140, Sec. 1."

FILED
JAN 3 1957
JOHN T. FEY, Clerk

No. [redacted] 673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

TEXAS GULF SULPHUR COMPANY,
Cross-Petitioner,

v.

ÆTNA LIFE INSURANCE COMPANY,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

In The

Supreme Court of the United States

October Term, 1956

Texas Gulf Sulphur Company,
Cross-Petitioner,

v.

Ætna Life Insurance Company,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texas Gulf Sulphur Company, cross-petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the case entitled "*Ætna Life Insurance Company* v. *Texas Gulf Sulphur Company*" on August 3, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, printed in Appendix "A" hereto, *infra*, p. 21, is reported in 141 F. Supp. 84. The opinion of the Circuit Court of Appeals,

printed in Appendix "A" hereto, *infra*, p. 1, is reported in 235 F. 2d 791.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 3, 1956, p. 41, *infra*. A timely petition for rehearing, filed on August 18, 1956, was denied on October 8, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

1. Whether an annuity contract which contains no specific date of termination should endure for the period of time which the contracting parties, as reasonable men, intended for the contract to be enforced.

2. Whether a contract containing provision for rate escalation during three periods of time should be judicially determined to be in force for two of those periods but not during the third.

STATUTE INVOLVED

There is no statute of the United States or of any state involved in the question presented by this cross-petition.

STATEMENT

A petition for declaratory judgment to determine the period of duration of a group annuity contract as to present and future employees was filed by the Texas Gulf Sulphur Company on January 29, 1953, against the Ætna Life Insurance Company. The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a corporation organized under the laws of Texas, and the defendant a corporation organized under the laws of Connecticut. The group annuity contract forming the basis

of the controversy between the parties was executed on August 1, 1934, in the State of New York; the stated purpose of the contract was to provide annuities for Texas Gulf Sulphur employees who applied to Texas Gulf for benefits under the plan and who agreed that certain percentages of their compensation might be deducted from their salaries to be used in part payment of the cost of the annuity. Texas Gulf was to pay the balance of the cost. The contract provided that *present* employees of Texas Gulf, as well as *future* employees of Texas Gulf, could be covered by the annuity plan; the premium rates charged those employees who participated from 1934 to 1944 would not be raised during that 10-year period, but Ætna reserved the right to modify rates for groups of employees who first came under the plan in 1944-1954, 1954-1964, and 1964-1974. On April 18, 1944, the parties entered into a new contract, referred to as a rider, which changed the premium guarantee clause so that Ætna was entitled to increase premium rates at a different rate according to the same three specific periods: 1944-1954, 1954-1964 and 1964-1974. Neither the contract nor the rider contained an express provision establishing a date of termination.

On June 30, 1950, Ætna gave notice to Texas Gulf that it would not accept new entrants under the plan after August 1, 1951; on January 26, 1954, Ætna served Texas Gulf with a supplemental notice denying Ætna's obligation to cover new entrants after August 1, 1954, the twentieth anniversary of the annuity contract, and claiming the further right to refuse coverage to any employee after December, 1959, regardless of when the employee began contributing to the plan. As a direct result of the first notice, Texas Gulf sought judicial determination of its rights under the contract by filing a petition for declaratory judgment.

The District Court granted Texas Gulf's motion for summary judgment, holding that the contract was clearly intended to be a long-term pact which the parties, as reasonable men, intended to be enforced until at least August 1, 1974. The District Court regarded itself as bound by the decision of the Circuit Court of Appeals in *Freeport Sulphur Company* v. *Aetna Life Insurance Company,* 206 F. 2d 5,[1] which was interpreted as holding that the premium guarantee clause was an important key to the intention of the parties as to the duration of a similar group annuity contract.

The Court below affirmed the judgment of the District Court, but modified the judgment to hold that the contract was to endure only until August 1, 1964. This result was reached by reading the contract as providing for three periods of rate escalation (1934-1944, 1944-1954, and 1954-1964), and the Court below then holding that the date of August 1, 1964, was within the range of reasonableness as a matter of law.

The *Freeport* case was properly regarded by all parties to the suit, and by all participating judges as a companion case to the present suit; in the *Freeport* case, the group annuity contract provided that annuity rates charged employees who participated from 1934 through 1939 would never be raised, but Aetna reserved the right to modify rates for groups of employees who first came under the plan in 1939-1944, 1944-1949, and 1949-1954. The District Court, in the *Freeport* case, entered judgment for Freeport Sulphur, holding that the contract was intended by the parties, as reasonable men, to endure for at least twenty-five years; on appeal, the Circuit Court of Appeals affirmed

[1] For convenience, the opinion of the Circuit Court in the *Freeport* case is printed as Appendix "B", *infra*, p. 29; the opinion of the District Court in the *Freeport* case is printed as Appendix "C", *infra*, p. 41.

the judgment but modified it to hold the contract in force for twenty years. The basis of the holding in the *Freeport* case was found in the premium guarantee clause, which evidenced the intent of the parties to be bound until at least 1954.

Judge Russell dissented in the *Freeport* case on the ground that the finding of the District Court that twenty-five years was within the reasonable intendment of the parties was amply supported by the evidence. Judge Hutcheson dissented from the holding of the Court below in the case at bar on the ground that the *Freeport* decision compelled an identical finding of twenty years' duration for the Ætna-Texas Gulf contract, disregarding entirely the differences in the contracts and intent of the contracting parties here.

REASONS FOR GRANTING THE WRIT

1. The Court below has decided an important question of state law in a way which conflicts with decisions of the highest court of the state. While every person concerned with both the *Freeport* case and the present suit conceded that the question of contract duration should be solved by the application of New York law, and while the words of all four opinions in the *Freeport* case and this case reaffirm this fundamental principle, it is believed that the Court below departed from the law of New York as announced and consistently applied by the Courts of that state. The court below interpreted the *Freeport* opinion, and based its own opinion, upon what period of time for duration of the contract was reasonable as a matter of law. See 235 F. 2d 791 at 793:

> "In Freeport * * * the escalation could apply only to those coming in during three subsequent periods * * *. It was this time that the Court in Freeport con-

> sidered, as a matter of law, to be within the range of reasonableness. Applying the same formula * * * in the Texas Gulf contract * * * the terminable date [is] then fixed at August 1, 1964."

There can be no quarrel with the basic premise of the Court that the contract should endure for a reasonable period of time. *Cohen & Sons, Inc.* v. *M. Lurie Woolen Co., Inc.*, 232 N.Y. 112, 113 N.E. 370; *Pope* v. *Terre Haute Car & Mfg. Co.*, 107 N.Y. 61, 13 N.E. 592. But when the Court establishes the duration of the contract by an arbitrary and mechanical standard and terms it reasonable "as a matter of law", the Court has departed from New York law as applied by New York courts, and has created a new contract rather than interpreted an existing contract. New York, in consonance with every other American jurisdiction, uniformly holds that where rights and obligations under a contract are not clear, it is the duty of the Court, in construing the contract, to ascertain and give effect to the intent of the parties. *O'Neill Supply Co.* v. *Petroleum Heat & Power Co.*, 280 N.Y. 50, 19 N.E. 2d 676; *Kennedy* v. *Porter*, 109 N.Y. 526, 17 N.E. 426. The clearest and most logical statement of the necessary reconciliation between the concept of "reasonableness" and the concept of "intent of the parties" that is required by New York law is found in the language of Judge Russell in the *Freeport* case:

> "Generally, where the parties to a contract fail to specify a definite term for its continuance, with the result that the judicial process must be resorted to in order to determine a 'reasonable time' which should elapse before it is terminated, the primary effort of the Courts is to determine the time which, as reasonable men, the parties to the contract ought to have understood each other to have in mind at the time the contract was executed, but which time was, nevertheless,

> for some reason, omitted from the contract." 206 F. 2d 5, at 8.

If the Court below endeavored to determine "the time which, as reasonable men, the parties * * * ought to have understood each other to have in mind", their opinion wholly fails to reflect that endeavor. The opinion below can be read in only one way. The Court regarded the premium escalation clause as controlling, and by their reading of the contract, the escalation clause yielded the date August 1, 1964. The *Freeport* opinion reveals no such cavalier treatment of the background and negotiations leading up to the final contract. In that opinion, it was said by the majority:

> "In reserving the right to modify the premium rates on this policy, however, Ætna specifically provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date". 206 F. 2d 5, at 7.

The *Freeport* decision, then, was soundly based on an ascertainment of the parties' intendments; there was no suggestion in that case that premium escalation periods furnished a mechanical and automatic answer to the question of contract duration. The *Freeport* decision was a correct application of New York law by the Circuit Court of Appeals; the Court below, by departing from the rationale, and the holding, of the *Freeport* case, departed from the precepts of New York law.

The Court below decided an important question of state law in a way which conflicts with decisions of the highest court of the State in yet one other particular. New York, speaking through its court of last resort, has consistently and uniformly declared that where the parties to a contract have given it a practical construction by their conduct, the

court will generally adopt that construction as evidencing the intent of the parties and as determining the extent of uncertain or unclear contractual duties. *Fox Film Corp* v. *Springer,* 273 N.Y. 434, 8 N.E. 2d 23; *Atwater & Co.* v. *Panama Ry. Co.,* 255 N.Y. 496, 175 N.E. 189. For over fifteen years, Ætna and Texas Gulf operated under the contract now in question; for over fifteen years the parties to the contract evidenced an understanding of their rights under the contract; for over fifteen years, every act and every word of Ætna demonstrated that Ætna, as well as Texas Gulf, construed the contract as binding until at least 1974. For example, first, there is the application which, on the form prepared by Ætna, had calculations of employees' contributions up to fifty years. If we grant that these calculations were the product of skilled executives, then we find that Ætna's executives, whomever they might be, showing their contemplation of the contract lasting until 1984. Second, the contract itself reserves to Ætna the right to increase premium rates through August 1, 1974. And Ætna's executives, when asked to explain why they would plan through the latter date if they had no reasonable expectation of the contract lasting that long, were unable to furnish an explanation. Third, when Ætna was in the process of congratulating itself upon its success in selling the contract to Texas Gulf, it calculated the premium costs by multiplying the first annual premium by fifty — again projecting the duration of the contract to 1984. Fourth, Ætna entered into a new contract with Texas Gulf in 1944, and again established the premium rates through August 1, 1974. Fifth, in 1949, the year before Ætna asserted its right of cancellation, it circulated Employee Announcement Booklets which looked thirty-five years ahead. Sixth, Ætna repeatedly represented to both old and new employees of Texas Gulf that the retirement plan was permanent in its

operation. The Court below does not indicate that the construction placed on the contract by the parties was a factor in their decision; indeed, the opinion makes no mention of this construction by the parties at all. The law of New York takes cognizance of an interpretation of a contract made by the parties themselves; in this case, such a practical construction of the contract had been asquiesced in by both parties for over fifteen years. By ignoring this practical construction, and by failing to give it credence as an index of the intentions of the parties, the Court below decided an important question of state law contrary to the holdings of the highest court of that state.

2. The decision of the Court below is believed to be erroneous; the sole basis for the decision is in the premium escalation clause, but the court uses dates which are nonexistent in the contract provisions. The heart of the decision below is contained in these words:

> "In Freeport those coming under the plan during the first period (1934-1939) could not be affected by subsequent increases and their rights were beyond alteration of any kind. Obviously then, the escalation could apply only to those coming in during the three subsequent periods (1) 1939 to 1944, (2) 1944 to 1949, (3) 1949 to 1954. It was this time that the court in Freeport considered, as a matter of law, to be within the range of reasonableness. Applying the same formula of three comparable periods subject to escalation in the Texas Gulf contract, the periods will be (1) 1934 to 1944, (2) 1944 to 1954, (3) 1954 to 1964, with the terminal date then fixed at August 1, 1964. Since there is no 'exempt' period, and, unlike the Freeport contract, Texas Gulf annuitants coming under the plan during the 'first' period (1934 to 1944), are subject to the subsequent escalation increases, we thus adhere uniformly to the principles established in Freeport and yet take adequate account of the differences." 235 F. 2d 791 at 793.

Even if we assume that the escalation clauses of the contract are the only "key" to reasonable duration, the holding of the Court below is demonstrably erroneous; *the escalation clauses in the Ætna-Texas Gulf contract are not those relied upon by the court.* The original Ætna-Texas Gulf contract provides:

1. During 1934 to 1944, Ætna may not increase premium rates.
2. During 1944-1954, Ætna reserves the right to increase rates but the increased rates can be no more than 5% greater than the original rates.
3. During 1954-1964, Ætna reserves the right to increase rates, but the increased rates can be no more than 10% greater than the original rates.
4. During 1964-1974, Ætna reserves the right to increase rates, but the increased rates can be no more than 15% greater than the original rates.

In 1944, a rider to the original contract was executed. It provided that:

1. At any time after 1944, Ætna could modify premium rates.
2. Between 1944 and 1954, the premium rates can be no higher than those in effect on the date of the execution of the rider.
3. Between 1954 and 1964, Ætna reserves the right to increase rates but the increased rates can be no more than 4.75% greater than the rates of August 1, 1944.
4. Between 1964 and 1974, Ætna reserves the right to increase rates, but the increased rates can be no more than 9.50% greater than the rates of August 1, 1944.

Thus, contrary to the Court's opinion, the contract in question provides for rate escalation *through 1974.* There is

simply no basis in the contract for the court's statement that the three periods of escalation ended in 1964. If importance is to be given to the premium guarantee clause, there is no escape from the proposition that the court below misread the contract, and their decision is therefore completely erroneous.

3. Clearly the question presented is of importance to the insurance industry and to the thousands of employees and employers who are in a position similar to that of Texas Gulf Sulphur Company. The *Freeport* case and this case are the only two judicial determinations of rights under group annuity contracts where no date of termination is specified. Similar group plans are in widespread use throughout the United States. The effectiveness of such plans is dependent in large part upon the stability and certainty of the rights accruing under contracts such as the one in the case at bar, and without a sure and dependable standard to furnish guidance, rights under group annuity plans, in which millions of dollars have been invested, become unpredictable and undependable. The essence of contracts like the one at hand is permanent security for the employees enrolled. When two similar contracts have received such differing interpretations that there is no guide post for future conduct, the benefits of group annuity contracts have been impaired and their worth has been depreciated.

4. A total of seven judges have considered the basic problem common to the *Freeport* case and to this case, and there have been virtually as many answers to the question as there have been judges; the problem is now so unsettled, and future results so unpredictable that the guidance of this Honorable Court is necessary if the contractual rights of thousands of others situated similarly

to the parties here are to be made certain. The Honorable Judge Skelly Wright, of Louisiana, was the first to consider the whole problem, and arrived at a conclusion that twenty-five years was a reasonable time for the *Freeport* contract to last. On appeal, Judge Russell agreed, but he was cast in the role of a dissenter when Judges Strum and Hutcheson ruled that twenty years was long enough. Relying largely though not wholly upon their rationale, Judge Kennerly, in this case, sought to follow the guidance of the majority in the *Freeport* case, and he held here that forty years was reasonable. Now the Honorable Judges Brown and Cameron, admitting that Judge Kennerly was "led" to his decision by the prior opinion of the Circuit Court, held nevertheless that he was in error and that thirty years is about right. Yet, while Judges Brown and Cameron take critical note of Judge Hutcheson's departure from the principles enunciated in the *Freeport* decision, they themselves end up with another concept equally new and foreign to the prior opinion and to the briefs. No one, and least of all Ætna, has ever urged that thirty years was reasonable, and no party, certainly not Texas Gulf, has even suggested the approach by which this court arrived at its decision. The result of the *Freeport* decision and the decision in this case is that no craftsman or lawyer, endeavoring sincerely to advise his client, can state, except with the wildest speculation, what the duration of any retirement program may be. When we consider the many divergent views enunciated by the judges in the Fifth Circuit on the question at issue, we cannot escape the confusion implicit in this decision when contrasted with the *Freeport* case. If the *Freeport* case was wrong, as Judge Hutcheson apparently suggests it was, it should be overruled openly and without doubt. If, however, the *Freeport* decision is sound, then nothing but confusion is gained by giving it lip service but at the same

time so modifying its principles as to reach a result which no craftsman can follow. If the *Freeport* case is sound, and correctly applies New York law, as we submit it does, then its principles should be clearly affirmed, confusion avoided, and a clear course set for others to follow along this tremendously important path.

CONCLUSION

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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F. G. Coates
1600 Esperson Building
Houston, Texas

January 2, 1957

Of Counsel:

Baker, Botts, Andrews & Shepherd
Houston, Texas

PROOF OF SERVICE

A copy of this cross-petition has on this 2nd day of January, 1957, been delivered to W. Braxton Dew, Ætna Life Insurance Company, Hartford, Conn., and W. N. Arnold, Jr., of Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas, attorneys for petitioner, by depositing the same in the U. S. mail, properly addressed and duly posted.

.....

F. G. Coates

APPENDIX A

ÆTNA LIFE INSURANCE COMPANY,
Appellant,

v.

TEXAS GULF SULPHUR COMPANY,
Appellee.

No. 15776

United States Court of Appeals

FIFTH CIRCUIT

Aug. 3, 1956

Action was brought by corporation against insurer for declaratory judgment. The United States District Court for the Southern District of Texas, Thomas M. Kennerly, J., 141 F. Supp. 84, entered judgment adverse to insurer, and insurer appealed. The Court of Appeals held that where group annuity policy issued by insurer to corporation on behalf of employees of corporation gave corporation, in consideration of annual payment of premiums, a continuing option to purchase annuity for its new employees at price fixed in policy, and policy provided for no term, and it was agreed that rates as to annunities could not be raised as to employees coming under the plan in the first 10 years, insurer had no right to discontinue the contract as to new coverage until 30 years after date of policy.

Modified and affirmed.

Hutcheson, Chief Judge, dissented in part.

Annuities — 1

Where group annuity policy issued by insurer to corporation on behalf of employees of corporation gave corporation, in consideration of annual payment of premiums, a

continuing option to purchase annuity for its new employees at price fixed in policy, and policy provided for no term, and it was agreed that rates as to annuities could not be raised as to employees coming under the plan in the first 10 years, insurer had no right to discontinue the contract as to new coverages until 30 years after date of policy.

W. N. Arnold, Jr., Houston, Tex., W. Braxton Dew, Hartford, Conn., Fulbright, Crooker, Freeman, Bates & Jaworski, Houston, Tex., for appellant.

Thos. M. Phillips, Houston, Tex., Baker, Botts, Andrews & Shepherd, Houston, Tex., F. G. Coates, James L. Read, Houston, Tex., of counsel, for appellee.

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM.

As the opinion of Chief Judge Hutcheson so colorfully portrays the case, accurately delineates the issues, expounds the competing contentions and, by contrasting the large area of our mutual agreement with the limited scope of our differences, effectively emphasizes the point of departure, we think it best to indicate briefly our disagreement in result and reasoning and thus preserve the continuity of that opinion.

We are all in agreement that the Freeport decision was correct. [141 F. Supp. 84]. With unhesitating fidelity to that result and Freeport's reasoning, we each seek diligently to discover and apply its teachings. We are also all in agreement that in its interpretation, the nature of the judicial system based on written opinions as the means of giving life to law and guidance to its craftsmen, requires that we, as would any other Judges, read it for what it says and then *say* what it says, Mississippi Valley Barge Line Co. v. Indian Towing Co., Inc., 5 Cir., 232 F. 2d 750, 1956 A.M.C. 757, with none having, with none claiming, in that process, advantage or disadvantage from participation in that former appeal or the opinion.

We are likewise in agreement that, though responsibility must be laid at our feet for having led him into it, the District Judge gave too much, indeed almost conclusive, weight to the much discussed words[1] of the opinion. We are, finally, in agreement that, reiterating here Freeport's determination that the parties contemplated a *long-time* contract of extended duration — a holding which completely undercuts Ætna's main prop, the argument of non-mutuality and the incongruity of giving Texas Gulf but not it, an unlimited escape — what we attempted to do, what we intended to do, there was to declare in terms of law, the time *beyond* which the parties could not reasonably have meant to go — a time we fixed there at March 31, 1954, for a total term of 20 years.

It is here that our paths diverge. For agreeing once more that a 20-year term has no magic legal significance and that this conclusion of law must find its source in the setting of the Freeport contract, Judge Hutcheson concludes, as we cannot, that the contracts are identical and hence, results must be identical. In that process he also disregards altogether the much mooted sentence and actually abandons the stated rationale of Freeport — reasonable time — for an entirely new concept advanced to this day nowhere in prior opinions or briefs, that the contining option was binding only for the — "'"year period *entered* upon thereafter."'"

But the contracts are different — significantly different in the very area of specified contract periods, and admittedly because of the difference in the underlying bargains. In Freeport rates as to annuities, original and increased, could *never* be raised as to employees coming under the plan in the first five years (1934 to 1939). Recognized soon as an

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[1] Judge Strum wrote:

"In reserving the right to modify the premium rates on this policy, however, Ætna specifically provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date." [206 F.2d 5, 7.]

onerous agreement, Ætna a few months later was unwilling to extend that vital privilege to Texas Gulf and sought[2] (in the intense sales campaign it waged to *persuade* Texas Gulf to give it this business) by extending the periods from five to ten years, to make up for it. It is, we believe, unreasonable for us, as Judges, to think that when two huge business concerns negotiate on high levels between articulate, skilled executives over a contract of immense importance to both, that this difference was either trivial or, as Ætna puts it, "adventitious." And, accepting Judge Hutcheson's rationale of an option limited to the contract period then "entered upon", the contract, expressly making Texas Gulf's for ten, rather than Freeport's five-year period, subjected Ætna to *double* that obligation.

So, while we do not think, on the one hand, that the words (note 1, supra) are conclusive, we are, on the other hand, equally unwilling either to disrate them in Ætna's words, brief page 25 as " * * * evidently thrown in for good measure and without much thought * * * demonstrably conceived in error * * * included through inadvertence * * * [and thus] * * * entitled to little weight * * * ", or effectually disregard them altogether because, in Judge Hutcheson's language, these "* * * specific dates are of no more significance in the determination of the overall reasonable time for its ending than those periods introduced by 'et cetera.'" We think here, as in Freeport, they were of

[2] Ætna's brief [page 22], after pointing out the difference between Freeport and Texas Gulf contract, states: "By August 1, 1934, when the Texas Gulf contract became effective, Ætna was no longer willing to exempt the employees entering the plan during the first 5 years from increases. But perhaps with a will to make up to Texas Gulf in a measure for the denial of this valuable exemption no longer available to anyone, Ætna agreed not to increase premiums on any employees for 10 years from inception (instead of 5 as in Freeport) and not to make subsequent increases except to the extent of 5% of the original premiums every 10 years (instead of 2½% every 5 years as in Freeport). * * *"

significance and so intended by the Court. The very spirited attack (see note 8 Judge Hutcheson's opinion) so soon made on them by Freeport's Petition for Rehearing brought these very arguments to the Court's attention while it was still fresh and new. Of course, it would be unrealistic to say that opinions must be amended or modified to meet every supposed deficiency pointed out in Petitions for Rehearing, but we who now follow can hardly assume, in this posture, that this was mere make-weight.

As we have pointed out, there is a critical difference both in date and reasons as between the Freeport and Texas Gulf contracts. It, we think, both highlights the difference in specified times and, correlatively, the similarity of purpose. So that, once again, we are all in agreement that the "key" is largely to be found in this contractual provision. In Freeport those coming under the plan during the first period (1934 to 1939) could not be affected by subsequent increases and their rights were beyond alteration of any kind. Obviously then, the escalation could apply only to those coming in during the three subsequent periods (1) 1939 to 1944, (2) 1944 to 1949, (3) 1949 to 1954. It was this time that the Court in Freeport considered, as a matter of law, to be within the range of reasonableness. Applying the same formula of three comparable periods subject to escalation in the Texas Gulf contract, the periods will be (1) 1934 to 1944, (2) 1944 to 1954, (3) 1954 to 1964, with the terminal date then fixed at August 1, 1964. Since there is no "exempt" period and, unlike the Freeport contract, Texas Gulf annuitants coming under the plan during the "first" period (1934 to 1944) are subject to the subsequent escalation increases, we thus adhere uniformly to the principles established in Freeport and yet take adequate account of the differences.

The decree of the District Court appealed from in this cause will therefore be modified so as to designate August 1, 1964, as the date upon which Ætna has the right to discontinue the contract as to new coverages, and, as so modified, said decree will be affirmed.

Modified and affirmed.

HUTCHESON, Chief Judge (concurring in part and dissenting in part).

This appeal from a summary judgment presents for review what, with minor and unimportant variations, is a twice told tale of two group annuity contracts entered into on April 1, 1934, and August 1, 1934, between Ætna Life Insurance Company, as insurer, and Freeport Sulphur Company, on the one hand, and Texas Gulf Sulphur Company, on the other, as employer. It is concerned with the contentions, counter-contentions, and litigations arising out of the fact that in neither of the contracts was a time of termination stated, and thereby hangs the tale.

The first contract gave rise to the litigation in the District Court of the United States for the Eastern District of Louisiana, which was dealt with and disposed of, in the District Court, in Freeport Sulphur Co. v. Ætna Life Ins. Co., 107 F. Supp. 508, 510, and, in this court on appeal, in Freeport Sulphur Co. v. Ætna Life Ins. Co., and reverse title, 206 F. 2d 5, 41 A.L.R. 2d 762.

As the tale unfolded in the first suit, with Freeport in its self-assigned role of Little Red Riding Hood, and Ætna in that assigned to it by Freeport of the wicked wolf, Freeport's claim was that the contract was in perpetuity and was without termination, while that of Ætna was that the contract neither states nor implies any term for the duration and is subject to a good faith termination by Ætna at any time.

The district judge, to whom the controversy was submitted on motion for summary judgment filed by Ætna and Freeport, rejecting both of these views as extreme and unwarranted, held that the contract was one for a reasonable time, and that the evidence fixed this at twenty-five years, and April 1, 1959 as the day upon which Ætna might discontinue writing new coverages at the rates provided

in the several steps. Dissatisfied with the judgment, both Freeport and Ætna appealed, and this court, agreeing with the district judge throughout except as to what was a reasonable time for termination of the contract, held, one judge dissenting, that the evidence fixed this not at twenty-five but at twenty years. The decree was accordingly modified so as to designate April 1, 1954, as the day upon which Ætna might discontinue the writing of new coverages, and, as modified, the decree was affirmed.

It is the second of these contracts, with respect to which contentions and controversies had arisen before and had been going on during the pendency of the Freeport suit, which has given this litigation rise. Filed by plaintiff, Texas Gulf Sulphur Company, in the Southern District of Texas, on January 20, 1953, when the Freeport suit had finally come to an end, the complaint alleged: that an actual controversy had arisen between plaintiff and defendant as a result of a notice given by Ætna, that it had the right to refuse coverage to persons becoming employees after July 31, 1950, and that it was entitled to charge rates for the coverage of such employees in excess of the rates set forth in the schedule of guarantees in said group annuity contract. Alleging that, as to such persons, defendant can make no increases in its rates other or greater than as set forth in said schedule, plaintiff sought a declaratory judgment, that Ætna continued to be obligated at the rates provided in the contract to insure all such persons employed after July 31, 1950, and an injunction.

By amended complaint, plaintiff alleged that, after the filing of the suit, plaintiff had received from defendant a supplemental notice,[1] dated January 26, 1954, fixing August

[1] "(1) We hereby respectfully notify you that we stand in all respects on the notice directed to you on or about June 30, 1950, Exhibit 2, to your complaint in Texas Gulf Sulphur Co. v. Ætna Life Ins. Co. [141 F.Supp. 84], now pending in the United States District Court at Houston. However, we hereby further notify you that if said former notice should for any reason be held premature or otherwise defective, the privileges and benefits of your Group Annuity Contract No. GA-114 will

1, 1954, when the contract will have been in force twenty years, as the cut-off date, and further stating in effect that after December 23, 1959, it would not be bound under the group annuity contract to sell any further annuities.

Ætna first moved under Section 1404(a) to transfer the cause to the Southern District of New York for the convenience of the parties and in the interest of justice. This motion denied, Ætna answered defending its right to issue the notices complained of and to take action in accordance therewith.

Thereafter, alleging that the contract on its face evidenced an intention by defendant that it was to continue at least to the year 1984, and attaching documents, affidavits, depositions, and letters, plaintiff filed a motion for summary judgment, declaring invalid the notices issued by Ætna, purporting to terminate the contract, and ordering specific performance of it until the year 1984.

Defendant Ætna, on its part, basing its motion upon the pleadings, affidavits, and exhibits in the case, moved for a summary judgment, declaring: the notice of June 30, 1950, issued by it, valid; that the contract was as matter of law terminable as of August 1, 1951, the date named in the first notice; and that, in the alternative, the first paragraph of the notice of January 26, 1954, note 1, supra, was valid and effective, and the contract was terminable as of August 1, 1954, and judgment should so declare.

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in no event be extended to any employees not becoming eligible for coverage, under the terms of the said contract, prior to August 1, 1954, when the contract will have been in force twenty years.

"(2) We notify you further, as a new and independent proposition, that after Dec. 23, 1959, when your initial charter expires, no further annuities or items of annuity will be sold or issued under the said Group Annuity Contract No. GA-114 to, for, or on behalf of any person whomsoever, whenever employed, and whether or not now purchasing annuities or items of annuity under the contract.

"(3) We are giving you this supplemental and additional notice in order that its validity may be determined in the suit now pending if either party so desires."

Finally, and as an additional, separate, and independent ground, defendant alleged that the second paragraph of the notice of January 26, 1954, note 1 supra, is valid and effective and entitles defendant to refuse after December 23, 1959, when the present existing charter of plaintiff expires, to write any further annuity or items of annuities.

On these motions, supported by a voluminous record made up of documents, affidavits, and depositions, there was a full hearing and argument, and the district judge, holding that the case was ruled by our opinion in the similar case of Ætna Life Ins. Co. v. Freeport Sulphur Co., decided by this court, 206 F. 2d 5, 41 A.L.R. 2d 762, determined that a reasonable time under the contract in suit was forty years. He entered his decree accordingly. Ætna has appealed.

In the course of his carefully prepared opinion in the cause,[2] referring to the Freeport litigation and correctly declaring, "The contract here is substantially the same as the Freeport contract, the facts in this case and in that case are quite similar, and most of the questions raised here are settled by the opinions in that case", he held, as the Freeport case had held, that the contract, though not a perpetual, was a continuing, one, not terminable by Ætna at its will or void for want of mutuality, and that, " 'since no term for the option is provided in the contract, it is terminable after a reasonable time.' "

Declaring: "This Court is, therefore, called upon as the Courts were called upon in the Freeport case to determine what is a reasonable time", and noting that the district judge in the Freeport case had held twenty-five years a reasonable time, while this court holding this to be excessive had declared twenty years reasonable, the district judge thus carefully set out the dominant clauses.[3] These, placed

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[2] 141 F.Supp. 84, 85.

[3] Saying: "The modifying clause in the Freeport contract referred to by both Courts is as follows:

" '* * * provided that at no time between April 1, 1939, and Mar. 31, 1944 shall premium rates be established which

in each contract in accordance with "the guarantees to the employer of premium rates", while guaranteeing the continuance, during each successive period "entered upon", of the rate fixed for that period, reserved to Ætna the right to determine as to each new period whether it would be entered upon.

Rejecting plaintiff's contention that the parties contemplated that the contract should remain in force until 1984, or for fifty years, the district judge also rejected defendant's contention that, if the Freeport decision was adhered to, a reasonable time would be twenty years, and its inde-

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are more than 7½% greater than the original rates, at no time between April 1, 1944, and Mar. 31, 1949, shall premium rates be established which are more than 10% greater than the original rates, at no time between April 1, 1949, and Mar. 31, 1954 shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates *increasing by 2½% of the original rates for each five year period entered upon thereafter.*' [Emphasis supplied.]

"A similar clause in the contract here is as follows:

" 'The Company reserves the right, upon three months' written notice to the employer, to modify any one or more of the following at any time after this contract has been in force ten years:

* * * * *

" '(c) The premium rates in Tables A, B, and/or C provided, however, that at no time between Aug. 1, 1944, and Aug. 1, 1954, shall premium rates be established which are more than 5% greater than the original rates, at no time between Aug. 1, 1954 and Aug. 1, 1964 shall premium rates be established which are more than 10% greater than the original rates, at no time between Aug. 1, 1964, and Aug. 1, 1974, shall premium rates be established which are more than 15% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates *increasing by 5% for each ten year period entered upon thereafter.*' [Emphasis supplied.]"

the court concluded: "Using the same process of reasoning here as there, it seems clear that Ætna itself contemplated that the contract here would remain in effect at least until Aug. 1, 1974, or a period of forty years from its date."

pendent contention that after 1959, the date when the original charter of Gulf would have expired, defendant could cease altogether writing new contracts.

Reasoning by analogy from the statement in our opinion in the Freeport case in effect that the mention of the year 1954 in the premium change clause as the last year mentioned by name indicated that Ætna contemplated that the contract would remain in effect at least until that date, the district judge declared that the mention of the year 1974 in the change of rate clause in the contract before him as the last date mentioned by name gave like significance to that date. So declaring he took the year 1974, or forty years after its signing, as the reasonable time during which the contract should and would continue in effect and entered judgment accordingly.

Appealing from that judgment, Ætna, attacking the rulings and judgment of the district judge, is here presenting five questions for decision,[4] and urging as to each that the answer should be in the affirmative.

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[4] These are:

I. Whether this case should not have been transferred to the United States District Court for the Southern District of New York under Section 1404(a) of the Judicial Code, 28 U.S.C.A. § 1404(a).

II. Whether, if the Freeport case stands, under its authority Ætna should not be relieved from writing annuities for all employees except such as became eligible for coverage prior to August 1, 1954, the twentieth anniversary of the contract.

In this connection Ætna states: "The District Court correctly considered itself bound by the decision of this Court in Freeport Sulphur Co. v. Ætna Life Ins. Co. (7-24-53) 206 F.2d 5, 41 A.L.R.2d 762, but it misconstrued that decision and erred in not holding that a reasonable time for the termination of the contract as to new employees was 20 years from inception, as was held in the Freeport case."

III. Whether Ætna is not entitled to a trial on the fact question, or the mixed question of fact and law, as to what is a reasonable time, so as to make it improper to have entered a summary judgment against Ætna in any event.

Addressing myself to each of these in turn, I think it sufficient to say of the claim of error implied in question one that, in my opinion, it is without substance. To appellant's claim that only New York judges are competent to determine what is New York law, and that, since the contract was a New York contract, the case should have been sent to New York for trial, a claim which on its face seems most provincial, appellee opposes the admitted facts, that plaintiff is a Texas corporation with its principal office and place of business and the great majority of its employees in the Southern District of Texas, and the further fact that the same questions here presented for decision have already been decided in this circuit.

Of the claim presented in plaintiff's question four, that this court should in this case reconsider and overrule the decision in the Freeport case, it need only be said that we regard that case as having been correctly decided and are content with the decision.

Of the error implicit in question five, it is sufficient, I

IV. Whether, upon a reconsideration of this whole problem, this court should not now overrule the reasoning of the Freeport case and hold (a) that the contract, lacking any fixed or ascertainable term, is terminable at will in its executory features after such time elapses as to show good faith at inception, and that such time (17 years) had elapsed as a matter of law at maturity of Ætna's first notice of termination dated 6-30-50; (b) that the contract lacks consideration or mutuality, and has become unfairly discriminatory contrary to applicable statutes of both New York and Texas, and that it is therefore terminable insofar as it remains executory, and was so terminable at the time defendant served its first notice of June 30, 1950; and (c) that if the so-called "reasonable time rule" applies in determining when new employees may be excluded, that time had expired long before any notices of termination were served or matured in this case.

V. Whether the District Court did not err in refusing to hold that Ætna was entitled to cease writing new annuities on all employees, both old and new, as of Dec. 23, 1959, at which time there was expiration of the charter of Texas Gulf which was in existence and non-renewable at the time the Group Annuity contract was executed.

think, to say that for the reasons hereafter briefly stated and more fully developed in the brief of appellee, the contention that, because Texas Gulf's charter as it existed in 1934 would have expired in 1959, unless amended, it should be held that the contract expired in that year, is completely unmeritorious.

There is no evidence showing or tending to show that Ætna knew of the expiration date of Gulf's charter, therefore none that the fact that it was for a limited time entered at all into the consideration of the parties in negotiating for and in entering into the contract. There is certainly no more of merit in Ætna's contention that the original time limit of Gulf's charter fixed or determined the time of the termination of the contract than there was for Freeport's insistence in its case, an insistence which the trial court and this court rejected out of hand, that because its charter was a perpetual one, it must be held that its contract was in perpetuity.

It is settled law that a corporation is not limited to contracting obligations which must be completed before the expiration of the corporate life, and in 13 American Jurisprudence, "Corporation", "Power to Contract", Sec. 810, p. 823, it is said: "The mere fact that a corporate contract may extend beyond the term of the life of the corporation does not destroy it."[5] Besides the Legislature in 1937, by the adoption of Art. 1315(a), R.C.S., Vernon's Ann. Civ. St. Tex., provided a method for the extension of charters, and, pursuant thereto, Texas Gulf's corporate life was, on Dec. 15, 1951, extended to Dec. 23, 2009, giving it an additional fifty years.

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[5] Cases to the same effect are City of Detroit v. Detroit Citizens' St. Ry. Co., 184 U.S. 368, 22 S.Ct. 410, 46 L.Ed. 592; City of Minneapolis v. Mineapolis Street Railway Co., 215 U.S. 417, 30 S.Ct. 118, 54 L.Ed. 250; People v. O'Brien, 111 N.Y. 1, 18 N.E. 692, 2 L.R.A. 255; New York Central & H. R. R. Co. v. City of New York, 202 N.Y. 212, 95 N.E. 638; Miner v. New York Central & H. R. R. Co., 123 N.Y. 242, 25 N.E. 339.

When it comes, however, to question two and the error it presents, that, though holding that the Freeport decision was controlling in this case, the district judge, by designating August 1, 1974, a date twenty years later than the date fixed in that decision, as the date after which Ætna could discontinue writing new coverages at the stipulated premium rates, had failed to give it proper application, it seems clear that appellant is right and that the judgment should be modified.

I am of this view, not only because the evidence, in my opinion, affords no rational basis for any substantial distinction between this case and Freeport's case, but because the evidence in this case, as it did in Freeport's case, compels the conclusion that under the undisputed facts in both cases, Ætna could not as matter of law be compelled to write new coverages under the rate limitations of its contract after its twentieth anniversary, April 1, 1954, in Freeport's case, August 1, 1954, in Gulf's.

This clearly and plainly results, I think, from the provision of the contract giving Ætna the right during successive periods to make limited increases in the premium rates, and from the fact that the key to Ætna's obligation under the contract in each case is to be found in that clause of the guarantees to the employer, providing that the original pension premium rates may not be increased by more than a specified percent in any period, five years in Freeport's, and ten years in Gulf's, contract, "entered upon" after the first five years in Freeport's, and the first ten in Gulf's contract.

The naming of the specific dates, note 3 supra, in each contract was without controlling influence on the overall time the contracts might be continued. The stated dates for the first three periods in each case, as well as the unstated ones, provided for by the "et cetera" provision, were merely hypothetical periods based upon the expectation,

not that Ætna must, but that Ætna might,[6] still be issuing new coverages under the contract as each respective period opened, and they operated not to compel it to enter upon such periods but to oblige it if it entered upon each particular period to continue without change during that period the rate fixed for it.

The twenty year difference in the projection of stated dates came about in a very simple way. In the Freeport contract, effective April 1, 1934, it was provided that the rates for employees who came into the contract during the first five years could never be raised, but for all other employees the rates could be increased 7½ percent of the original rate in April 1, 1939, increasing by 2½ percent of the original rate every five years thereafter. The 1939 increase would apply only to new employees because those employees who had already entered the plan were exempt, but the 1944 and subsequent five year increases would apply to the future premiums of all employees who had come into the plan since 1939 or should come into it after that date.

By August 1, 1934, when the Texas Gulf contract became effective, Ætna was no longer willing to exempt from increases the employees entering the plan during the first five years. But perhaps with a will to make up to Texas Gulf in a measure for the denial of this valuable exemption no longer available to anyone, Ætna, as is shown in note 3, supra, agreed to an escalation scale fixing the successive periods which might be entered upon at ten years and the percentages of the successive escalations in each period "entered upon" at five instead of 2½ percent.

Aware, as we were, of the focus of attention on the provisions in the proposal for guarantees and in the contract itself, that the dominant consideration for entering into the contract was the fixing of these guarantees[7] so that

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[6] Cf. what is said in Coffin v. Landis, 46 Pa. 426, at pages 432-433.

[7] Counsel for appellee in his brief on pages 55 to 58 take note

Ætna could not step the rates up at its will and pleasure, this court, in its opinion in the Freeport case and in explanation of our refusal to approve the district judge's findings of fact in a summary judgment case and our determination as matter of law that Ætna would have the right at the end of the third of the rate increase periods, expiring

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of the great significance and importance of the premium guarantees, and thus points them up:

"To refer again to the formal proposal submitted in May 1934, the following guarantee is found also under the heading, 'The Guarantees To The Employer', and sub-heading 'Guarantee of Premium Rates': 'Pension premium rates are guaranteed against increase for 10 years from the date of the contract. The basic pension premium rates may not be increased by more than 5% for *each 10 year period entered upon after the first ten years.*'

"*The importance of this premium guarantee must not be underestimated.* In the group annuity contracts issued today, Ætna Life Insurance Company reserves the right, after a specified time, to make any increases desired in premiums, chargeable to old and new employees alike, thus providing the insurance company with an effective escape clause. In the group annuity contracts issued prior to April, 1934, a provision was usually inserted reserving the right to make any desired change in the premium rate of new employees entering the plan after a stated number of years following its execution. This type of provision was also an effective means of escape since it permitted the insurance company to so increase the premiums on new employees that the employer would be forced to cancel the contract.

* * * * *

"There can be no doubt that these definite premium guarantees played a decisive role in the success of Ætna in selling the contract to Texas Gulf. * *

* * * * *

"In the final drafting of the contract as executed, the parties were careful to see that the aforementioned premium guarantees were carried forward and made a part of the contract. If these premium guarantees, which were considered by both parties to be the decisive reason for placing the contract with Ætna, together with the other statements found in these preliminary negotiations, are to have any meaning, the contract must be continued at least through 1974." (Emphasis supplied.)

on March 31, 1954, to cease writing new coverages on that date, declared [206 F. 2d 7]:

> "We differ with the district judge only as to what is a 'reasonable time' for the operation of the contract. We think 25 years is too long. Since April 1, 1934, economic conditions have radically changed, interest rates have sharply declined, and life expectancy has substantially lengthened. All these things enter into the rates to be charged for such a policy as this.
>
> "In reserving the right to modify the premium rates on this policy, however, Ætna specifically provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date."[8]

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[8] In its petition for rehearing, Freeport, realizing the apparent inconsistency in pointing as a limitation upon the contract to the stated date, March 31, 1954, and seeking to turn it to the account of the claim it had already labored in vain with the district judge, that the stated time dates had no significance in fixing the total time the contract was to run, put the matter thus:

"The majority opinion is inconsistent with itself because, while recognizing the significance of the enumeration of time periods in the rate limitation clause in the policy, the opinion ignores the fact that the enumeration is followed by the highly important words 'et cetera'. Without any reason the majority opinion denies any effect to these words and thus deletes them from the policy or makes them meaningless.

"In the majority opinion the court states:

"'In reserving the right to modify the premium rates on this policy, however, Ætna *specifically* provided for increases in rates through Mar. 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date.'

"It is true that the rate limitation clause specifically referred to a series of five-year periods ending March 31, 1954, but it is no less true that this reference was followed by the words 'et cetera'. If the inclusion of the date 'March 31, 1954' signified that the contract would remain in effect at least until that date, as the Court has held, the use of the words 'et cetera' must necessarily have signified that Ætna contemplated that the contract would remain in effect beyond that date. We have contended that the use of those words contemplated several

It is this latter paragraph in the opinion, and this paragraph alone, which is responsible for the fact that the cause was decided below on the basis of a period of forty years rather than, as was decided in Freeport's case, that twenty years was the limit and, though it was certainly not written with the specific intent that it should form the controlling basis for the decision, it is as certainly true: that, both in what was said and in what was left unsaid, it was and is misleading, and that the fault for the district judge's decision in this case cannot be ascribed to him.

On the contrary, it must be laid at the door of our opinion in apparently pointing, as a guide to the decision of the question, to the last date specifically mentioned in the premium guarantees rather than, as should have been done, to the significance of the date as the ending of one of the series of five year periods beginning in 1939, and then pointing out more clearly that we did that, having actually

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five year periods after 1954, the last date mentioned, but it can hardly be denied that they necessarily require at least one such period — otherwise 'et cetera' is given no meaning at all. Would anybody reading the contract in 1934, and seeing the term 'et cetera' have supposed that Ætna could stop covering new entrants in 1954?

"Lord Coke observed a long while ago that 'an et cetera doth imply some other necessary matter'. See Bagley v. Rose Hill Sugar Co., 111 La. 249, 35 So. 539, 548 (1903) where the Court in considering the effect of the words 'et cetera' ('etc.') quoted with approval the Century Dictionary to the effect that these words are used when more instances of the same sort might have been mentioned but are omitted for brevity. Beers, Ætna's Vice President who negotiated the contract for Ætna, in his deposition in effect conceded that the purpose of the use of the words 'et cetera' was to eliminate the necessity of continuing to recited further specific periods ending, e.g., Mar. 31, 1959, March 31, 1964, March 31, 1969, et cetera.

"By the same reasoning, therefore, by which the Court properly concluded that Ætna's obligation to cover new entrants must continue until Mar. 31, 1954, the court cannot avoid the conclusion that the obligation must continue at least five years beyond that time. Otherwise the court reads the words 'et cetera' out of the contract."

entered upon the third period, Ætna could not, as matter of law, complain of being required to continue writing new coverages until its end.

Applying the same rule to Gulf's contract, which provided for ten instead of five year periods and began the periods in 1934, I think it must be held in this case that, having given notice within the second period, that it did not intend to enter upon another ten year period, though Ætna could not complain of being required to continue writing new coverages until the end of that period, it could cease to do so at its end.

The district judge, in the Freeport case, where the argument was vigorously pressed upon him by Freeport that, by provisions for indefinite succession of these five year steps, the parties had indicated an intention that the contract would continue over the long period of time which the "et cetera" clause provided for, carefully pointed out that, by the very indefiniteness of continuation of these periods, the parties had made it plain that the provision for successive periods was not intended to, it did not furnish a guide to the determination of the overall time the contract would last.

While I agree with the district judge in the Freeport case, and with Freeport's counsel in its motion for rehearing, that the periods marked off by specific dates are of no more significance in the determination of the overall reasonable time for its ending that those periods introduced by "et cetera", I am convinced that in the provisions for the successive periods is to be found the key to the decision of Freeport's case and of this one. This key is that in Freeport's case each five year period entered upon after 1939, and in Gulf's each ten year period entered upon after the making of the contract, represents, it is, the reasonable time for the continuation of the contract during which Ætna may be compelled to continue writing new coverages at the specified rates. This is to say that in contracting

with Gulf Ætna intended to, and did, bind itself that as each successive period was entered upon it would be bound for that period not to change the rates and, per contra, that while Ætna, after entering upon the period between 1944 and 1954, would not, by giving notice of its intention to cease writing new coverage at specified rates, have the right to depart from these rates before the period was over, it would be allowed to do so at its end.

Holding, then, as matter of law, that Ætna was bound by its entry in 1944 upon the ten year period from 1944 to 1954, to continue to write new coverage during that period at the rates fixed for it, but that, having before entering upon the next ten year period beginning August 1, 1954, announced its intention to cease writing at the rates fixed for that period, it was entitled to do so at its end.

I concur in the decision of the majority that the judgment should not be affirmed as written but should be modified. Of the opinion, however, that it should be modified to designate August 1, 1954, as the date upon which Ætna had the right to discontinue the contract as to new coverages at the rates fixed for successive periods, I dissent from the opinion of the majority designating August 1, 1964 as the cut off date.

TEXAS GULF SULPHUR COMPANY

v.

ÆTNA LIFE INSURANCE COMPANY.

Civ. A. No. 7272.

United States District Court

S. D. Texas, Houston Division.

June 8, 1955.

Judgment Modified Aug. 3, 1956.

See 235 F2d 791.

Action for declaratory judgment. The District Court, Kennerly, J., held that where group annuity policy, issued by insurer to corporation in behalf of employees of corporation, gave corporation, in consideration of annual payment of premiums, a continuing option to purchase annuity for its new employees at price fixed in policy, and policy providing for no term, policy was terminable only after reasonable time which, under record, was 40 years from date of policy, and was not terminable at will by insurer.

Decree accordingly.

Annuities — 1

Where group annuity policy issued by insurer to corporation in behalf of employees of corporation gave corporation, in consideration of annual payment of premiums, a continuing option to purchase annuity for its new employees at price fixed in policy, and policy provided for no term, policy was terminable only after reasonable time which, under record, was 40 years from date of policy, and was not terminable at will by insurer. 28 U.S.C.A. § 1332; Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A.; Vernon's Ann. Civ. St. Tex. art. 1315(a).

Baker, Botts, Andrews & Shepherd, Thomas M. Phillips, James L. Read and F. G. Coates, Houston, Tex., for plaintiff.

W. Braxton Dew, Hartford, Conn., Fulbright, Crooker, Freemen, Bates & Jaworski, W. N. Arnold, Jr., Houston, Tex., for defendant.

KENNERLY, District Judge.

On August 1, 1934, Texas Gulf Sulphur Company, engaged in mining sulphur, (hereinafter called "Texas Gulf") and the Ætna Life Insurance Company (hereinafter called "Ætna") entered into a "Group Annuity Contract" covering numerous employees of the Texas Gulf, which was then, has since been, and is now engaged on a large scale in the mining and production of sulphur in Texas. Such contract appears to be plain and unambiguous, *except as to the time of its termination.*

Differences arose between the parties as to the time of termination, and this suit was instituted January 29, 1953, by Texas Gulf against Ætna seeking declaratory judgment construing such contract and certain notices as to its termination given thereunder and finding and fixing such time of termination, etc.

Texas Gulf is a corporation organized under the laws of Texas, and Ætna is a corporation organized under the laws of Connecticut. They are citizens of different states, and there is jurisdiction here under Section 1332, Title 28 U.S.C.A.

Each, Texas Gulf and Ætna, have moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and have filed affidavits, depositions, exhibits, etc., which with the other papers constitute the record in the case. This is a hearing of both such motions for summary judgment on oral argument and briefs, disposition of such motions will dispose of the case.

1. At the time (August 1, 1934) this contract was entered into between Texas Gulf and Ætna, there was in existence between Ætna and Freeport Sulphur Company, engaged in the productions of sulphur in Texas and Louisiana, a similar contract dated *April 1, 1934* (referred to as Freeport contract) *in which, as here, the time of termination was not fixed.* Differences arose between the parties to the Freeport contract resulting in litigation, a history of which may be found in Freeport Sulphur Co. v. Ætna Life Insurance Co., 107 F. Supp. 508, at page 510, and the majority and dissenting opinions 5 Cir., 206 F. 2d 5, at page 8, 41 A.L.R. 2d 762. The contract here is substantially the same as the Freeport contract, the facts in this case and in that case are quite similar, and most of the questions raised here are settled by the opinions in that case. A lengthy discussion here of the authorities cited by the parties seems unnecessary.

2. Following the ruling in the Freeport case, it must be held that the contract here is a continuing option given Texas Gulf which is not terminable at the will of either party, not void for lack of mutuality, not discriminatory under the laws of either Connecticut or Texas, and not a perpetual one. It should be and it is said here, as was said of the Freeport contract by the trial judge in the Freeport case and approved by the Court of Appeals [206 F. 2d 7]: "Since no term for the option is provided in the contract, it is terminable after a reasonable time."

Judge Russell, in his dissenting opinion in the Freeport case, puts it this way:

> "Generally, where the parties to a contract fail to specify a definite term for its continuance, with the result that the judicial process must be resorted to in order to determine a 'reasonable time' which should elapse before it is terminated, the primary effort of the courts is to determine the time which, as reasonable men, the parties to the contract ought to have under-

> stood each other to have in mind at the time the contract was executed, but which time was, nevertheless, for some reason, omitted from the contract."

This Court is, therefore, called upon as the Courts were called upon in the Freeport case to determine what is a reasonable time for the contract here to run from and after its date, August 1, 1934. In order to so determine, the Court will look to the situation of the parties and their negotiations prior to the date of the contract, the contract itself, and the action of the parties under such contract since its date.

3. The situation of each and the negotiations between Texas Gulf and Ætna prior to the date of the contract is fully shown by the record, but no good purpose would be served by discussing it in detail here. However an examination thereof shows that Texas Gulf had long desired and needed to have a long-range retirement, pension or annuity plan for its then and future employees, and that Ætna knew of such desire and need and was willing to meet it. In the negotiations between them, through their officers and agents, carried on in personal interviews and by correspondence extending over a period of many months, substantially every phase of the contract was discussed and the views and desires of each made clear to the other. This discussion included the matter of the premium rates and necessary changes therein during the period of a long-range contract. It also included the matter of the termination of the contract. It would be unreasonable to say that either party overlooked or ignored so vital a question as the time of termination in a contract so important.

4. What light does the contract itself throw upon the question?

The suggestion that the contract should be construed against Ætna because prepared by Ætna does not, under the facts, appeal to me. But it is unusual that Ætna should

execute and put in force within a few months two contracts (the Freeport contract and this one) with no definite date of termination fixed in either. This, however, throws little or no light on the question we have here.

On the question of a reasonable time under the Freeport contract, the trial judge said, 107 F. Supp. 513:

> "What is a reasonable time must be determined from all the circumstances of the case, and this court, after a study of all the circumstances as reflected in the record, concludes that a reasonable time would be twenty-five years from the date of the contract. Holt v. St. Louis Union Trust Co., supra [4 Cir., 52 F. 2d 1068]; Bach v. Friden Calculating Mach. Co., supra [6 Cir., 155 F. 2d 361]; Cohen & Sons, Inc., v. M. Lurie Woolen Co., Inc., supra [232 N.Y. 112, 133 N.E. 370]."

The trial judge thus found twenty-five years from the date of that contract to be a reasonable time thereunder, but in the majority opinion of the Court of Appeals this time is reduced to twenty years from the date of the contract.

It is said in the majority opinion (italics mine):

> "We differ with the district judge only as to what is a 'reasonable time' for the operation of the contract. We think 25 years is too long. Since April 1, 1934, economic conditions have radically changed, interest rates have sharply declined, and life expectancy has substantially lengthened. All these things enter into the rates to be charged for such a policy as this.
>
> "In reserving the right to modify the premium rates on this policy, however, Ætna *specifically* provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date.
>
> In the absence of a specific provision as to duration, which Freeport could have insisted upon, and in view of substantially changed conditions already referred to, we regard 20 years as a reasonable period of duration, after which Ætna is entitled to *discontinue new cover-*

ages. Compare Texas & P. Ry. Co. v. City of Marshall, 136 U.S. 393, 10 S. Ct. 846, 34 L. Ed. 385."

The modifying clause in the Freeport contract referred to by both Courts is as follows (italics mine):

> "* * * provided that at no time between *April 1, 1939 and March 31, 1944* shall premium rates be established which are more than 7½% greater than the original rates, at no time between *April 1, 1944 and March 31, 1949* shall premium rates be established which are more than 10% greater than the original rates, at no time between *April 1, 1949 and March 31, 1954* shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates increasing by 2½% of the original rates for each *five year* period entered upon thereafter."

A similar clause in the contract here is as follows (italics mine):

> "The Company reserves the right, upon three months' written notice to the employer, to modify any one or more of the following at any time after this contract has been in force ten years:
>
> * * * * *
>
> "(c) The premium rates in Tables A, B and/or C provided, however, that at no time between *August 1, 1944*, and *August 1, 1954*, shall premium rates be established which are more than 5% greater than the original rates, at no time between *August 1, 1954* and *August 1, 1964* shall premium rates be established which are more than 10% greater than the original rates, at no time between *August 1, 1964* and *August 1, 1974* shall premium rates be established which are more than 15% greater than the original rates, et cetera, *the maximum permissible difference between the new rates and the original rates increasing by 5% for each ten year period entered upon thereafter.*"

Using the same process of reasoning here as there, it seems clear that Ætna itself contemplated that the contract here would remain in effect at least until August 1, 1974, or a period of forty years from its date.

Texas Gulf presses upon me that under the language so quoted from the majority opinion the finding here should be that Ætna contemplated that this contract should remain in effect until 1984, or a period of fifty years. I do not think this view is meritorious.

On the other hand Ætna says that Judge Strum's language quoted is with respect to the coverage of old employees and not the coverage of new employees. This is, I think, clearly incorrect.

Ætna also says:

> "It is regrettable that Judge Strum included the paragraph under discussion in an opinion that otherwise shows a firm grasp of the facts as to the workings of Group Annunity Contracts, because it can be clearly demonstrated that the statement was inadvertent, superficial, and erroneous, etc."

Both Judge Strum who wrote the majority opinion and the Judge (Hutcheson) who concurred therein, are well known for the accuracy and clarity of their opinions, and I do not agree with this view of Ætna.

Aside from the views of the Judges as set forth in the opinions in the Freeport case, a comparison of the clause of this contract quoted above with respect to premium rates with the similar clause in the Freeport contract makes it clear, I think, that both contracts are long-range contracts, and this contract is a longer range contract than the Freeport contract, and was so intended by the parties.

Again, considering this contract in its entirety and from its "four corners" leads to the conclusion, I think, that the parties intended making a contract of long duration.

5. Looking now to the actions of the parties under and in carrying out this contract.

From 1934 to 1950, about fifteen years, operations under this contract went forward without complaint from Ætna, even though Ætna knew it was unprofitable for it. It was not until 1950 that Ætna gave Texas Gulf notice of its claim of the right of termination. The facts shown by the record of such fifteen years' operation under such contract do not, I think, help Ætna in its present claim that the parties had in mind a short-range contract.

6. But, Ætna says that the Texas charter of Texas Gulf expired December 23, 1959, and that the parties intended December 23, 1959, to be the date of termination of this contract, etc.

The facts are that during the negotiations for, and at the time of execution of this contract, Texas Gulf's charter was, under the *then* provisions of the laws of Texas to expire December 23, 1959. However, the Legislature of Texas, by the Act of 1937 (now Article 1315(a), Vernon's Ann. Civ. St. of Texas) made provisions for the extension of the life of such corporation, and on December 15, 1951, Texas Gulf's corporate life was extended to December 23, 2009.

My conclusion is that in view of such facts the contentions of Ætna are not meritorious.

7. My findings and conclusions are that since no time for the termination of this contract is fixed, it is terminable after a reasonable time, and a reasonable time would be forty years from and after August 1, 1934, i.e. that Ætna may discontinue the contract as to new coverage on August 1, 1974. Also that any notice or notices given Texas Gulf by Ætna to the contrary are to no effect.

It follows from what has been said that Texas Gulf's motion for summary judgment should be granted, and Ætna's motion for summary judgment should be denied. That declaratory judgment should enter in accordance with this opinion.

Let appropriate decree be drawn and presented.

APPENDIX B

FREEPORT SULPHUR CO. v. ÆTNA LIFE INS. CO.

Civ. A. No. 2678.

United States District Court

E. D. Louisiana, New Orleans Division.

Sept. 10, 1952.

Action for interpretation of an employees' group annuity policy issued by defendant to plaintiff in behalf of plaintiff's employees. The District Court, Wright, J., held that the policy was not cancellable by defendant at will.

Judgment in accordance with opinion.

1. Courts — 359

Law of New York governed interpretation of employees' group annuity policy issued by Connecticut insurer in favor of employees of Delaware corporation having executive offices in New York, where parties by submitting policy for approval of insurance division of New York evinced intention of having law of New York state apply to policy.

2. Insurance — 146(1)

Insurance contracts are governed generally by same rules of interpretation as are ordinary contracts.

3. Contracts — 147(1)

In interpreting contract effects should be given to intention of parties if it can be done consistently with legal principles.

4. Contracts — 147(2)

If intent of parties to contract is unambiguously expressed in contract, effect must be given to expressed intent.

5. **Contracts — 143**

Court has no authority to revise a contract or to make a contract for parties.

6. **Contracts — 148**

Where intent of parties to contract is not adequately expressed and cannot be discovered by study of entire contract, resort may be had to preliminary negotiations leading to contract.

7. **Contracts — 148**

Preliminary negotiations cannot be allowed to contradict or to vary terms of written contract, but may be used only to determine intent of parties.

8. **Contracts — 170(1)**

Manner in which contract has been construed by parties may be useful in determining intent of parties.

9. **Annuities — 6**
Insurance — 146(3)

An insurance or annuity contract is to be interpreted against party who drew it.

10. **Contracts — 216**

An interpretation calling for perpetual performance of a contract should be avoided unless a contrary intention of parties is manifest.

11. **Annuities — 6**

Rule of strict construction of insurance policy against insurer under employees' group annuity policy was not required to be applied where details of policy were worked out in conferences and by correspondence between representatives of parties.

12. Annuities — 3

Employees' group annuity policy issued by insurer to corporation in behalf of employees of corporation, under which insured agreed to pay an annuity, after certain age, to each employee of corporation who applied for coverage, and corporation was to pay annual premiums in advance, and which expressed no term but provided that premium rate would remain unchanged for employees participating during first five years, and that as to employees applying for coverage after first five years specified premium increases could be demanded, did not under record impose a perpetual obligation on insurer to provide coverage stated in policy.

13. Annuities — 3

Where employees' group annuity policy issued by insurer to corporation in behalf of employees of corporation gave corporation, in consideration of annual payment of premiums, a continuing option to purchase annuities for its new employees at price fixed in policy, and policy provided for no term, policy was terminable only after reasonable time which, under record, was 25 years from date of policy, and was not terminable at will by insurer.

14. Annuities — 1

Consideration which supported employees' group annuity policy issued by insurer to corporation on behalf of employees of corporation, which consideration was payment by corporation of annual premium, also supported corporation's option to purchase annuities for its new employees according to policy, which option was part of policy.

15. Contracts — 10(1)

An employees' group annuity policy issued by insured to corporation on behalf of employees of corporation, under which insurer agreed to pay an annuity, after certain age, to each employee of corporation who applied for coverage, and

corporation was to pay annual premium in advance, and which provided that premium rate would remain unchanged for employees participating during first five years, and that as to employees applying for coverage after first five years specified premium increases could be demanded, was not void for lack of mutuality.

Monroe & Lemann, New Orleans, La., Pearson E. Neaman, Thomas R. Vaughan, New York City, Nicholas Callan, Monte M. Lemann, New Orleans, La., for plaintiff.

Bigham, Englar, Jones & Houston, New York City, Milling, Godchaux, Saal & Saunders, New Orleans, La., George S. Brengle New York City W. Braxton Dew, Hartford, Conn., Eugene D. Saunders, New Orleans, La., for defendant.

WRIGHT, District Judge.

This case presents for judicial determination an interpretation of an employees' group annuity policy issued by the defendant to the plaintiff in behalf of its employees. The primary question to be determined is whether or not the contract, having no express term, is cancellable at will.

The plaintiff is engaged in the mining of sulphur. Its principal operations are in Louisiana and in Texas where the majority of its employees reside, but is executive offices are in the City of New York. It is chartered for perpetual existence by the State of Delaware. The defendant is an insurance company chartered under the laws of the State of Connecticut with its principal offices in Hartford.

The contract or policy in suit was entered into in 1934 after a series of conferences between the parties in the City of New York and after an exchange of correspondence between New York and Hartford. Before being issued, by agreement of the parties, the contract was presented to the Insurance Department of the State of New York for approval. After approval was obtained, it was mailed from Hartford to the plaintiff in New York.

Under the contract the insurer agrees to pay an annuity, after a certain age, to each employee of the plaintiff who applies for coverage. The consideration for the contract as recited therein is payment by the employer of annual premiums in advance, the employer subsequently to be partially reimbursed by payroll deductions from the employees participating.

No term is expressed in the contract. It is provided, however, that the premium rate as shown in the policy will remain unchanged for employees participating during the first five years, while as to employees applying for coverage after the first five years, increases amounting to not more than 2½% of the original rate for each five year period may be demanded, an increase in no event to result in a rate higher than the rates then being used by the company in new group annuity contracts providing similar benefits.[1]

The contract was in full force from April 1, 1934 until November 23, 1949, at which time Ætna advised Freeport that after January 1, 1950 employees not then participating

[1] "The Company also reserves the right, upon three months' written notice to the employer, to modify the premium rates in Tables A and B to be used in the calculation of premiums with respect to employees whose coverage hereunder commences five years or more after the date of this contract; provided that at no time between April 1, 1939 and March 31, 1944 shall premium rates be established which are more than 7½% greater than the original rates, at no time between April 1, 1944 and March 31, 1949 shall premium rates be established which are more than 10% greater than the original rates, at no time between April 1, 1949 and March 31, 1954 shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates increasing by 2½% of the original rates for each five year period entered upon thereafter; and provided further that no table of premium rates shall be established which results in a greater total premium than the table of premium rates then being used by the Company in the new Group Annuity contracts which it is then issuing providing similar benefits for employees in the same premium rate classification."

would not be covered under the group contract. In other words, Ætna gave notice of cancellation of the contract as to new employees without affecting the rights of employees already covered. This notice of cancellation followed a series of unsuccessful attempts on the part of Ætna to adjust the rate base provided in the contract upward as to new employees, the contract, because of softening interest rates and the increase in life expectancy, having become as to Ætna extremely onerous.

Plaintiff contends that the policy in suit is a perpetual obligation on the part of Ætna to provide the coverage stated in the policy. Ætna contends that the contract, being without term, is terminable by either party insofar as it is still wholly executory; that the contract, insofar as it is still wholly executory, lacks mutuality and hence is not binding upon either of the contracting parties; and that the contract, as construed as Freeport contends it should be, has now become discriminatory, and insofar as it is still wholly executory, its performance is prohibited by law.

[1] At the outset it should be determined by what law the contract shall be governed. The resolution of this question is simple for the reason that the parties themselves by submitting the contract for approval to the Insurance Division of the State of New York have evinced the intention of having the law of that state apply to it. The intention of the parties will prevail. Boseman v. Connecticut General Life Insurance Co., 301 U.S. 196, 202, 57 S. Ct. 686, 81 L. Ed. 1036. There is nothing in the law or the jurisprudence of Louisiana which suggests a different conclusion. Griffin v. McCoach, 313 U.S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481; Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.

[2-9] Insurance contracts are governed generally by the same rules of interpretation as are ordinary contracts, the cardinal rule being that effect should be given to the intention of the parties if it can be done consistently with legal

principles. If the intent of the parties is unambiguously expressed in the instrument itself, effect must be given to the expressed intent. The court has no authority to revise a contract or to make a contract for the parties. Where the intent is not adequately expressed and cannot be discovered by a study of the entire instrument, resort may be had to the preliminary negotiations leading to the contract. Preliminary negotiations, however, cannot be allowed to contradict or to vary the terms of the written instrument, but may be used only to determine the intent of the parties. The manner in which the contract has been construed by the parties themselves may also be useful in determining intent, for the parties, by their acts pursuant to the contract, show what is meant by the contract. The rule that in case of doubt as to the meaning thereof a contract is to be interpreted against the party who drew it is applicable to insurance or anuity contracts.

[10] In addition to these general rules of contract interpretation there is a further rule of particular importance to the contract in suit. An interpretation calling for perpetual performance of a contract should be avoided unless a contrary intention of the parties is manifest. Williston on Contracts, Revised Edition, Vol. 1, § 38; McCaffrey v. B. B. & R. Knight, Inc., D.C., 282 F. 334; Town of Readsboro v. Hoosac Tunnel & W. R. Co., 2 Cir., 6 F. 2d 733; Holt v. St. Louis Union Trust Co., 4 Cir., 52 F. 2d 1068. Perpetual contracts are not favored in the law, for perpetuity is a concept which eludes the grasp of the human mind.

Plaintiff, in its effort to support its position that the contract is a perpetual one in spite of the fact that no express term is provided, relies on the language of the contract itself and on the intention of the parties as expressed in the contract, in the negotiations leading up to the contract, and in the manner in which the contract has been construed.

Plaintiff's principal reliance is upon that portion of the contract which provides authority to increase the premium rate every five years as to new employees after the first five years. Plaintiff reasons from this provision that the parties intended the contract to cover new employees for all time to come. What plaintiff fails to realize is that this so-called escalator provision of the policy applies to employees now covered and who will continue to be covered. It, like the other provisions on which Freeport relies, would have been included in the contract even if Ætna had express authority to cancel. These provisions, therefore, cannot necessarily mean that the parties intended that the benefits of the contract would be available to new employees of Freeport ad infinitum.

Plaintiff seeks to prove an intention on the part of the parties to enter into a perpetual contract from the exchange of letters between the parties prior to its execution, together with statements made by officers of Ætna during this confection period. The court has studied those letters and the affidavits outlining the various statements. From this study it is convinced that the parties intended to enter into a contract which would be of long duration, but nowhere in any of the letters or in any of the statements is there any indication whatever that the parties had in mind a perpetual contract. In fact, as far as appears from the record, the officials of Ætna were without knowledge that Freeport's charter was a perpetual one.

Plaintiff also relies on the manner in which the parties have construed the contract as tending to prove it is of perpetual duration. It is true that the actions of the officials of Ætna, indicate clearly a conviction on their part that Ætna was bound by the contract, but again nowhere is there any indication whatever in any of their actions that Ætna's obligation under it would last forever.

[11] The details of the contract in suit were worked out in conferences and by correspondence between the repre-

sentatives of the two parties. Consequently, the rule of strict construction against the insurer need not necessarily be applied. Even if that rule be applied, however, there would still be nothing in this contract or in the circumstances surrounding this contract from which can be implied an intention on the part of the parties that it be eternal. There is nothing ambiguous about the contract. It just does not have an express term and nothing can be gleaned from the contract itself or from the intention of the parties which supplies this deficiency.

Plaintiff in support of its position relies on a series of cases involving interpretation of contracts which are silent as to duration.[2] In most of these cases, however, the contracts in question were either fully performed on one side or the party seeking specific performance had suffered a severe detriment such as the outlay of large sums of money pursuant to the contract. In such cases some courts have held the contracts to be of perpetual duration. No such case is presented here. Freeport has agreed only to pay annual premiums in advance and it has paid those premiums. If the contract in suit is no longer in force as to new employees, then no premium covering new employees will be included by Freeport in its annual payments. As to new employees Freeport will be required to make other arrangements, if it desires to offer them annuity coverage.

[12] It would appear clear, therefore, that this contract is not one of perpetual duration. Ætna then suggests that since the contract cannot be construed to be perpetual and since it has no definite term, it is cancellable at will by either party. Ætna cites many cases from New York and else-

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[2] Franklin Tel. Co. v. Harrison, 145 U.S. 459, 12 S.Ct. 900, 36 L. Ed. 776; McKell v. Chesapeake & Ohio R. Co., 6 Cir., 175 F. 321, affirmed on rehearing, 6 Cir., 186 F. 39; Western Union Tel Co. v. Pennsylvania Co., 3 Cir., 129 F. 849; Manners v. Morosco, 2 Cir., 258 F. 557; Llanelly Rwy. & Dock Co. v. London & Northwestern Rwy. Co., L.R. 8 Ch. 942.

where to support its position.[3] All of these cases, however, are clearly distinguishable from the case at bar. These cases involve employment contracts, agency contracts, commodity and service contracts. None of them involves an employees' group annuity contract nor any contract similar thereto.

[13] This employees' group annuity policy is a unilateral contract, an exchange of a promise for an act, a situation in which the insurer, in consideration of the annual payment of the premium by the employer, gives the employer, among other things, a continuing option to purchase annuities for its new employees at the price fixed in the contract. Such an option is not terminable at will by the insurer. Since no term for the option is provided in the contract, it is terminable after a reasonable time. Restatement, Law of Contracts, §§ 24, 47; Williston on Contracts, Revised Edition, Vol. 1 §§ 38, 61; Holt v. St. Louis Union Trust Co., supra; Bach v. Friden Calculating Mach. Co., 6 Cir., 155 F. 2d 361; Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., 232 N.Y. 112, 133 N.E. 370; Pope v. Terre Haute Car & Mfg. Co., 107 N.Y. 61, 13 N.E. 592. What is a reasonable time must be determined from all the circumstances of the case, and this court, after a study of all the circumstances as reflected in the recod, concludes that a reasonable time would be twenty-five years from the date of the contract. Holt v. St. Louis Union Trust Co., supra; Bach v. Friden Calculating Mach. Co., supra; Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., supra.

Before the enforcement of this contract can be required even for a reasonable time, however, Ætna's two remaining contentions must be disposed of. The first of these is that the contract lacks mutuality. Ætna asserts that the con-

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[3] Cronk v. Vogt's Ice Cream, Inc., Sup., 15 N.Y.S.2d 649; Echols v. New Orleans J. & G. N. R. Co., 52 Miss. 610; McGuire v. Nelson Bros., 177 La. 302, 148 So. 56; Sawman Oil Co., Inc. v. Bush, Tex.Civ.App., 136 S.W.2d 938; Duff v. P. T. Allen Lbr. Co., 310 Ky. 439, 220 S.W.2d 981.

tract as written would bind Ætna to carry out its provisions whereas Freeport is a liberty to discontinue and cancel the contract at any time. The contract itself is silent on Freeport's right in this regard. It is clear, however, from the nature of the contract and from printed material relating to the contract prepared by Ætna and distributed by Freeport to its employees that there was no intention on the part of the parties to bind Freeport. This fact alone, however, does not relieve Ætna of its obligations under the contract. As shown above, this contract is composed of a promise in the form of the policy to pay annuities to employees of Freeport pursuant to the provisions of the policy, provided Freeport accepts the policy and pays the premiums annually in advance. Freeport did accept the policy and did pay the annual premiums in advance. Consequently, the promise of Ætna, acted upon by Freeport, constitutes a valid contract, at least to the extent that the contract has been executed. Willard, Sutherland & Company v. United States, 262 U.S. 489, 43 S. Ct. 592, 67 L. Ed. 1086; Howard v. Mercury Record Corp., 5 Cir., 178 F. 2d 449; 17 C.J.S., Contracts, § 100c. Ætna impliedly admits this result by challenging as without mutuality only the executory part of the contract while respecting its obligations under the executed portion.

[14, 15] One effect of Freeport's performance under the contract is to give Freeport an option to purchase for its new employees annuities pursuant to the contract. The consideration supporting the contract also supports the option which is one of the terms of the contract. Cohen & Sons v. M. Lurie Woolen Co., supra; Warner-Quinlan Co. v. Smith, 134 Misc. 649, 236 N.Y.S. 241, affirmed 255 N.Y. 582, 175 N.E. 322. Such is the sense of the contract and such was the intent of the parties. It is not void for lack of mutuality.

Ætna's last contention is that the contract insofar as it

is still wholly executory has become discriminatory and therefore illegal. Ætna cites in support of its position Section 209 of the New York Insurance Law, Consol. Laws, c. 28, which provides in effect that an insurance company doing business in the state cannot make or permit "any unfair discrimination between individuals of the same class" in the purchase of life insurance or annuity contracts. Section 1214 of the Louisiana Insurance Law, LSA-R.S. 22:1214, is to the same effect. It is unchallenged that Ætna is now selling group annuities at higher premium rates than are included in the contract in suit. There is no showing, however, that this fact amounts to "unfair discrimination between individuals".

The contract in suit is a group annuity contract. Competion among insurers for group contracts is keen, and the insurer with the most attractive policy obtains the business. The premium rates charged by the same insurer vary from contract to contract. No attempt has been made by the states of New York or Louisiana to apply the discrimination statute to group annuity contracts. Certainly no standard premium rate has been set up in either state and the defendant itself apparently thought that the discrimination statutes were not applicable to this contract because immediately prior to the notice of cancellation it offered Freeport a new contract with a premium rate substantially less than the going rate. Under the circumstances this court is reluctant to strike down the contract on the highly questionable theory that further performance thereunder may be in violation of these discrimination statutes.

There being no valid reason in law or equity why specific performance of the contract should not be enforced, on presentation of proper form of judgment it will be ordered.

APPENDIX C

FREEPORT SULPHUR CO. v. ÆTNA LIFE INS. CO.

ÆTNA LIFE INS. CO. v. FREEPORT SULPHUR CO.

No. 14356.

United States Court of Appeals

FIFTH CIRCUIT.

July 24, 1953.

Rehearing Denied Sept. 15, 1953.

Action for determination, by declaratory judgment, of period of duration of group annuity contract issued by defendant to plaintiff on behalf of plaintiff's employees. The United States District Court for the Eastern District of Louisiana, J. Skelly Wright, J., 107 F. Supp. 508, entered a decree from which plaintiff and defendant appealed. The Court of Appeals, Strum, Circuit Judge, held that policy was terminable only after reasonable time which, under record, was 20 years from date of policy, and was not terminable at will by insurer.

Decree affirmed as modified.

Russell, Circuit Judge, dissented.

1. Annuities — 1

Where employee's group annuity policy issued by insurer to corporation in behalf of employees of corporation gave corporation, in consideration of annual payment of premiums, a continuing option to purchase annuity for its new employees at price fixed in policy, and policy provided for no term, policy was terminable only after reasonable time which, under record, was 20 years from date of policy, and was not terminable at will by insurer.

2. Courts — 359

Law of New York governed interpretation of employees' group annuity policy issued by Connecticut insurer in favor of employees of Delaware corporation having executive offices in New York, where parties by submitting policy for approval of insurance division of New York evinced intention of having law of New York State applied to policy.

3. Annuities — 1

An employees' group annuity policy issued by insurer to corporation on behalf of employees of corporation, under which insurer agreed to pay an annuity, after certain age, to each employee of corporation who applied for coverage, and corporation was to pay annual premium in advance, and which provided for premium rate to remain unchanged for employees participating during first five years and that as to employees applying for coverage after first five years specified premium increases could be demanded, was not illegally discriminatory under New York statute prohibiting insurer from unfairly discriminating between individuals of same class in purchase of life insurance or annuity contracts. Insurance Law N. Y. §209.

4. Contracts — 10(1)

An employees' group annuity policy issued by insurer to corporation on behalf of employees of corporation, under which insurer agreed to pay an annuity, after certain age, to each employee of corporation who applied for coverage, and corporation was to pay annual premium in advance, and which provided that premium rate would remain unchanged for employees participating during first five years, and that as to employees applying for coverage after first five years specified premium increases could be demanded, was not void for lack of mutuality.

5. Contracts — 216

Perpetual contracts, through sometimes sanctioned, are not favored in law, and construction of contract conferring

a right in perpetuity will be avoided unless compelled by unequivocal language of contract.

Monte M. Lemann, Monroe & Lemann, New Orleans, La., Nicholas Callan, New Orleans, La., and Thomas R. Vaughan and Pearson E. Neaman, New York City, of counsel, for Freeport Sulphur Co.

Eugene Saunders, Milling, Saal, Saunders, Benson & Woodward, New Orleans, La., George S. Brengle, Bigham, Englar, Jones & Houston, New York City, W. Braxton Dew, Hartford, Conn., for Ætna Life Ins. Co.

Before HUTCHESON, Chief Judge, and RUSSELL and STRUM, Circuit Judges.

STRUM, Circuit Judge.

This action was instituted by Freeport Sulphur Company to determine, by declaratory judgment, the period of duration of the contract hereinafter described, and for incidental relief. 28 U.S.C.A. §§ 2201, 2202.

Freeport is engaged in the mining of sulphur in Louisiana and Texas. In 1933, it desired to institute a pension plan for the benefit of its then and future employees, and those of its affiliated companies, by which annuities would be provided for said employees when they reached the age of retirement. To this end, beginning in August, 1933, Freeport commenced negotiations with the defendant Ætna Life Insurance Company, and another company, seeking to formulate a satisfactory group annuity plan. After spirited competition, the business was awarded to Ætna, which issued a group annuity contract dated April 1, 1934.

Under the policy, employees who had been in the employ of Freeport or its affiliates, for one year or more, and new employees after one year of employment, who had not attained the age of 65 years for men, 60 years for women, could apply for, and Ætna would issue to them, annuity policies maturing at stated ages, upon the payment by

Freeport of designated premiums, provided the employees remained in the employment of Freeport, or its affiliates, until their normal retirement age.

The contract obligates Ætna to cover every qualified employee who makes application to the employer (not to Ætna), and for whom the required premium is paid. Coverage becomes effective as to each such employee when Freeport gives notice to Ætna that an application therefor has been made by the employee to the employer. Thus, coverage is virtually automatic upon the application of a qualified employee. Ætna is not authorized to reject any such application, so long as the employee is eligible under the terms of the master contract. Premiums are paid annually by Freeport, which partially reimburses itself by deductions from the pay of the participating employees, both employer and employee bearing a portion of the cost. Ætna reserved the right to modify the premium rates from time to time after the first five years of operation of the policy, by increasing the rates by not more than 7½% of the original rate for the period of 1939-1944, and further increases of not more than 2½% for each additional five year period. See note 1, post. Ætna exercised these rights at the expiration of each five year interval.

The contract remained in force without interruption from April 1, 1934 until November 23, 1949, about 15½ years, when Ætna notified Freeport that after January 1, 1950, no new coverages would be issued under the contract. This amounted to a cancellation of the contract as to new coverages, but did not undertake to affect or impair the rights of employees already covered. It was this notice which precipitated this controversy.

The contract is unambiguous, except that it does not specify how long it shall remain in effect. The absence of such a clause is the basis of this suit. Freeport contends that the contract remains in effect perpetually, so long as premiums are paid. Ætna claims that the contract is termi-

nable at will by either party, insofar as it remains executory, that is, as to future coverages, but concedes that the rights of employees already covered cannot be impaired. The district judge accepted neither contention, but held that the contract is terminable by Ætna upon notice, after a reasonable time, which he determined to be 25 years after its inception, which would be April 1, 1959, thus leaving a further effective period of approximately 6½ years from the date of the decree below. 107 F. Supp. 508, 513. Both parties appeal from those portions of the decree adverse to them.

[1] In reaching his conclusions as to the interpretation and effect of the contract, the district judge thus correctly stated the law: "This employees' group annuity policy is a unilateral contract, an exchange of a promise for an act, a situation in which the insurer, in consideration of the annual payment of the premium by the employer, gives the employer, among other things, a continuing option to purchase annuities for its new employees at the price fixed in the contract. Such an option is not terminable at will by the insurer. Since no term for the option is provided in the contract, it is terminable after a reasonable time. Restatement, Law of Contracts, §§ 24, 47; Williston on Contracts, Revised Edition, Vol. 1, §§ 38, 61; Holt v. St. Louis Union Trust Co. [4 Cir., 52 F. 2d 1068]; Bach v. Friden Calculating Mach. Co., 6 Cir., 155 F. 2d 361; Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., 232 N.Y. 112, 133 N.E. 370; Pope v. Terre Haute Car & Mfg. Co., 107 N.Y. 61, 13 N.E. 592. * * * One effect of Freeport's performance under the contract is to give Freeport an option to purchase for its new employees annuities pursuant to the contract. The consideration supporting the contract also supports the option which is one of the terms of the contract." Of course, the contract would "discontinue" at any time Freeport ceased paying the required premiums.

[2] We agree with the foregoing conclusions of the district judge, as well as his conclusion that the contract should be interpreted according to the laws of New York, where it was delivered to Freeport and became effective, after having been submitted to, and approved by, the Superintendent of Insurance of that state. N. Y. Life Ins. Co. v. Chapman, 8 Cir., 132 F. 2d 688; Mutual Benefit Health & Acc. Ass'n. v. Kennedy, 5 Cir., 140 F. 2d 24; Order of U. C. T. v. Meinsen, 8 Cir., 131 F. 2d 176; 11 Am. Jur. 386(100). Compare Boseman v. Connecticut Gen. Life Ins. Co., 301 U.S. 196, 57 S. Ct. 686, 81 L. Ed. 1036; Transit Bus Sales v. Kalamazoo Coaches, 6 Cir., 145 F. 2d 804; Pasquel v. Owens, 8 Cir., 186 F. 2d 263; Newspaper Readers Service v. Canonsburg Pottery Co., 3 Cir., 146 F. 2d 963; Cockburn v. O'Meara, 5 Cir., 141 F. 2d 779.

[3] We also agree with the district judge that the contract is not illegally discriminatory under Sec. 209 of the New York Insurance Law, McK. Consol. Laws, c. 28, which prohibits any insurance company doing business in that state from making "any unfair discrimination between individuals of the same class" in the purchase of life insurance or annuity contracts. See also Louisiana Statutes Annotated Rev. Stat. 1950, Title 22, secs. 652, 1214.

[4] The district judge also correctly held that the contract was not void for lack of mutuality. The doctrine of mutuality is inapplicable here. It should be borne in mind that because of the distinctive characteristics which inhere in insurance contracts of this nature, cases relating to other types of contracts are usually inapposite upon the question of mutuality.

We differ with the district judge only as to what is a "reasonable time" for the operation of the contract. We think 25 years is too long. Since April 1, 1934, economic conditions have radically changed, interest rates have sharply declined, and life expectancy has substantially

lengthened. All these things enter into the rates to be charged for such a policy as this.

In reserving the right to modify the premium rates on this policy, however, Ætna *specifically* provided for increases in rates through March 31, 1954, indicating that Ætna itself contemplated that the contract would remain in effect at least until that date.[1]

[5] In the absence of a specific provision as to duration, which Freeport could have insisted upon, and in view of substantially changed conditions already referred to, we regard 20 years as a reasonable period of duration, after which Ætna is entitled to discontinue new coverages. Compare Texas & P. Ry. Co. v. City of Marshall, 136 U.S. 393, 10 S. Ct. 846, 34 L. Ed. 385. Perpetual contracts, though sometimes sanctioned, are not favored in the law. A construction of a contract conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract. Holt v. St. Louis Trust Co., 4 Cir., 52 F. 2d 1068; Town of Readsboro v. Hoosac Tunnel Co., 2 Cir.,

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[1] The policy provides, *inter alia*, that "The company also reserves the right * * * to modify the premium rates in Tables A and B to be used in the calculation of premiums with respect to employees whose coverage hereunder commences five years or more after the date of this contract; provided that at no time between April 1, 1939 and March 31, 1944 shall premium rates be established which are more than 7½% greater than the original rates, at no time between April 1, 1944 and March 31, 1949 shall premium rates be established which are more than 10% greater than the original rates, at no time between April 1, 1949 and March 31, 1954 shall premium rates be established which are more than 12½% greater than the original rates, et cetera, the maximum permissible difference between the new rates and the original rates increasing by 2½% of the original rates for each five year period entered upon thereafter; and provided further that no table of premium rates shall be established which results in a greater total premium than the table of premium rates then being used by the Company in the new Group Annuity contracts which it is then issuing providing similar benefits for employees in the same premium rate classification."

6 F. 2d 733. Of course, existing coverages as of March 31, 1954, are not affected, so long as premiums are paid.

Accordingly, the decree appealed from is modified so as to designate April 1, 1954, as the date upon which Ætna may discontinue the contract as to new coverages. As so modified the decree is

Affirmed.

RUSSELL, Circuit Judge (dissenting).

I am unable to join my colleagues in directing modification of the judgment of the trial court which held that twenty-five years was "a reasonable time" during which the insurance contract, which expressed no term, should remain operative. Certainly Ætna Life Insurance Company is not entitled to complain of this period under all of the circumstances of the case. Generally, where the parties to a contract fail to specify a definite term for its continuance, with the result that the judicial process must be resorted to in order to determine a "reasonable time" which should elapse before it is terminated, the primary effort of the courts is to determine the time which, as reasonable men, the parties to the contract ought to have understood each other to have in mind at the time the contract was executed, but which time was, nevertheless, for some reason, omitted from the contract. In the present case, consideration of the negotiations leading up to the insurance contract, the nature, terms and provisions of the contract as executed, and the purpose sought to be attained supports the finding of the trial court, if, indeed, the enforcement of a longer period would not have been justified. The insurer, having cautiously provided, so far as it could foresee, for each and every contingency affecting its liability and the compensation it should receive for its assumption, even to the extent of providing what it doubtless deemed to be protection in any and all events by its prescribed rate of increase in premiums during successive periods of five years each, which would equal, though not exceed, the prevailing rates which under-

writing conditions indicated at any particular time, (see note 1 in the majority opinion), can properly be regarded, at the inception of the contract, as having desired and intended that it should continue for a long period of time. With favorable rates, a large insurer desires increases in amount of insurance in force. Freeport, adopting the plan for its employees, may well be regarded as having had a similar understanding as to the existence of its option to insure new employees. The subsequent decline in interest rates and the increase in life expectancy, while they might make the contract burdensome for the time being, do not, I think, affect what must have been the understanding of the parties at the time the contract was executed.

I think the finding of the trial court is so well supported by the facts and circumstances of the case that the insurer has no cause for complaint.